PROCEEDINGS

OF THE

American Society of International Law

AT ITS

TWENTY-SECOND ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 26-28, 1928

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FIFTH SESSION

Saturday, April 28, 1928, at 10 o'clock a. m.

ANNUAL DINNER

Saturday, April 28, 1928, at 7.30 o'clock p. m.

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FOR THE YEAR 1928–29

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CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW [1]

(Revision of April 25, 1925.)

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the *American Journal of International Law* issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to

[1] The History of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

Article IV

Officers

The officers of the Society shall consist of a President, an Honorary President, three Vice-Presidents, such number of Honorary Vice-Presidents as may be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary, and a Treasurer, all of whom shall be elected annually, and of an Executive Council composed of the foregoing officers, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen. No elected member of the Executive Council shall be eligible for reëlection until the next annual meeting after that at which his term of office expires.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee, which shall consist of the five members of the Society receiving the highest number of ballots cast by the members at the first session of the Annual Meeting of the Society. The Executive Council may submit a list of nominees.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

Article V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council, or by vote of the Society.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

Article VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

Article VII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

Article VIII

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments to the Constitution may be proposed by the Council, or by a communication in writing signed by at least five members of the Society and deposited with the Recording Secretary within ten months after the previous annual meeting, and any amendments so deposited shall be reported upon by the Council at the succeeding annual meeting. All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon and no amendment shall be voted upon until the Council shall have made a report thereon to the Society.

REGULATIONS OF THE EXECUTIVE COUNCIL REGARDING THE EDITING AND PUBLICATION OF THE AMERICAN JOURNAL OF INTERNATIONAL LAW

Adopted May 22, 1924

1. There shall be a Board of Editors charged with the general supervision of editing the *American Journal of International Law* and determining general matters of policy in relation thereto.

2. The Board shall consist of not to exceed seventeen members to be elected annually by the Executive Council.[1]

3. Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles prepared by non-members of the Board.

4. There may be an Honorary Editor-in-Chief elected by the Council; and there shall be an Editor-in-Chief and a Managing Editor to be elected annually from among the members of the Board by the Executive Council, and to serve until their successors assume office.

The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*.

The Managing Editor shall have charge of the publication of the *Journal*, shall receive contributions and other material for publication, including books for review, and conduct the correspondence regarding the same.

In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by the Managing Editor, unless the Editor-in-Chief shall designate an acting Editor-in-Chief.

5. The *Journal* shall be made up of leading articles, editorial comments, a chronicle of international events, a list of public documents relating to international law, judicial decisions involving questions of international law, book reviews and notes, a list of periodical literature relating to international law, and a supplement.

(a) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief. Articles by members of the Board of Editors shall be submitted to the Editor-in-Chief, who shall decide as to their publication.

(b) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of Paragraph 6 hereof. Current notes of international events, containing no com-

[1] As amended April 24, 1926

ment, may be printed over the signatures of non-members of the Board of Editors in the discretion of the Managing Editor.

(c) In the department of judicial decisions, preference in publication shall be given to the texts of decisions of international courts and arbitral awards which are not printed in a regular series of publications available for public distribution. This department may also contain the texts of decisions of the Supreme Court of the United States and the highest courts of other nations involving important questions of international law. Comments upon court decisions, either those printed in the *Journal*, or those not of sufficient importance to print textually, may be supplied by members of the Board of Editors, and shall be printed as editorial comments or current notes.

(d) The chronicle of international events, and the lists of public documents relating to international law and periodical literature of international law, shall be prepared under the direction of the Managing Editor.

(e) The supplement shall be made up of the texts of important treaties and other official documents. Material for it shall be supplied by the Managing Editor, taking into consideration such suggestions from the members of the Board as they may have to offer from time to time.

6. The final make-up of each number of the *Journal* shall be submitted by the Managing Editor to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. In the absence of such a veto, the Managing Editor shall be authorized to publish the *Journal*, using approved material so far as approval is prescribed herein.

7. The *Journal* shall be published upon the 15th days of January, April, July and October, or as near to those dates as possible, and the Managing Editor shall have power to proceed with the publication of the *Journal* from the materials in his hand upon the first day of the month preceding the month of publication.

8. The Managing Editor shall receive such compensation for his services, and such allowance for clerical assistance, as may be fixed by the Executive Council.

TWENTY-SECOND ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

THE WILLARD HOTEL, WASHINGTON, D. C.

APRIL 26–28, 1928

FIRST SESSION

Thursday, April 26, 1928, at 8.30 o'clock p. m.

The meeting was opened by the President of the Society, Hon. CHARLES EVANS HUGHES.

THE OUTLOOK FOR PAN AMERICANISM—SOME OBSERVATIONS ON THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES

BY CHARLES E. HUGHES

President of the Society

The coöperation of independent states, reflecting the persuasions of reason, and neither intrigue nor the pressure of force, must of necessity make slow advances. It awaits the quieting of fears and emancipation from national obsessions. It depends not only on a growing perception of community of interests, but also on a fair appreciation of the antagonism of interests. When we demand coöperation abroad, we are apt to overlook the difficulties which beset coöperation at home. Our politics gives us the measure of these difficulties. Some seem to think it easy to obtain agreement among independent states, although it is plain that the varied desires and policies of communities, parties and groups among us, under a single government, cause interminable delays. We have a vast amount of talk in relation to serious problems, with a small proportion of accomplishment. In external affairs we may readily extend the area of discussion, but any important extension of the area of accord is a real achievement.

The coöperation of individuals is happily less restricted than that of governments. Economic forces have freer play, and except as government may intervene for the protection of national interests, economic opportunity is readily sought by all everywhere as the spirit of progress urges and intelligence shows the way. But governments are trustees of particular peoples, with their racial distinctions, their historic apprehensions, with their perception of local needs and with their hard-won positions of advantage. To effect international coöperation there must be a sense of substantial national gain and no persistent fear of serious national loss.

Pan American coöperation should find a good start in our contiguity.

But until recently this geographical relation had an aspect of irony. For our systems of communication belied our nearness. South America was for all practical purposes nearer to Europe than to North America. Now, with the Panama Canal, with multiplying facilities of travel by steamship, with improved methods of communication by mail, by wire and without wire, we have a keen sense of neighborhood. Lindbergh's recent flights are a prophecy of a new intimacy. With no uncertainties of North Atlantic weather to bring to naught the best laid plans, with abundant opportunities for the provision of airports and regular and frequent services, we are destined to become very well acquainted with each other and to have countless mutual interests but little dreamed of in the past.

History abundantly demonstrates that mere propinquity is not enough. Fortunately in this hemisphere we have a common political inheritance in our devotion to the ideals of liberty. We are all sons of the American revolutions. We have all revolted against tyranny. We have erected throughout the American continents the standards of national freedom and independence. We have thus been drawn together by a common sentiment which makes us neighbors in spirit. If anyone is disposed to scoff at this expression, and to emphasize differences and regrettable expressions of unneighborly points of view, let him consider conditions elsewhere throughout the world,—the jealousies, distrust, historic animosities, found in every region and, unless he is a hopeless cynic, I think that he will conclude that the relations of the American States do not suffer in comparison. On the contrary, the recent conference, quite apart from its specific achievements, afforded a welcome and striking demonstration of mutual friendliness which put to shame the prophets of evil. An international conference is a very uncertain affair, almost as uncertain as a trans-Atlantic air flight, so much may go wrong in fogs and contrary winds. When delegates come out of an American conference with a more friendly feeling and a stronger confidence in each other, an advance of enormous importance has been made, because the spirit of friendship is the vital breath of Pan Americanism.

In considering the essence and the scope of Pan American coöperation, we must rid ourselves of certain illusions. One of these seems to be widely cherished in this country. That is, that there is an entity known as Latin America on the one side, dealing with an entity known as the United States on the other. Attendance at a conference of the American States will dispel this illusion. There is no such entity as Latin America. There are twenty states, which comprise what is called Latin America, and these have distinct characteristics, aspirations and policies. Even in language, Brazil, with its vast territory stands separate. There is, properly speaking, no concert of Latin American States. There is no group of Latin American States which has, or can claim to have, dominance over other Latin American States. There is no desire on the part of any Latin American State to have its policy or rights determined by any other Latin American State or by any selected

number of Latin American States. The sentiment of national independence is a very real sentiment in all the Latin American States. It means independence of other Latin American States as well as independence of the United States. The idea that any one Power, or three or four important Powers in Latin America, could be endowed with authority to make decisions or to undertake to determine policies in Latin American affairs affecting other states, is a chimera.

Another illusion that should be dispelled is that the United States is seeking to dominate Latin America. To one who knows the sentiment of the American people, such an idea seems fantastic. But it is fostered by writers at home and elsewhere, and is encouraged by an appreciation of our enormous resources and power. The "Colossus of the North" is pictured to the imagination as a ruthless giant, without conscience and with unrestrained lust. We make no apologies for our prosperity and power. But the conception of the giant takes no thought of the limitations of its organism. The policy of the United States is in the control of the American people, acting through representative institutions. Executives and Congress must bow to public opinion. The dominant spirit of the American people is generous, liberal, instinct with love of independence and respect for it. If misguided persons, abusing the power with which they were temporarily entrusted, attempted to embark on a policy hostile to the proper enjoyment by the Latin American Republics of their sovereignty and independence, that policy would speedily and justly be repudiated and the authors of it condemned. Even efforts in the interest of public order, for the purpose of assisting in the maintenance of a reasonable stability and of protecting lives and property, meet with constant criticism and are carefully watched to prevent the hatching of any imperialistic scheme. Liberal sentiment in this country constantly grows. Appreciation of our difficulties in making popular government successful is more general. Disinclination to undertake enterprises foreign to the purposes of our government increases. We are indeed jealous of our rights and I trust that we shall always have the stamina to maintain them with self-respect and with proper regard for the rights of others. But the notion that we are looking for opportunities to intervene in the concerns of our neighbors and to take upon ourselves the burdens of managing them, that we are animated by a desire to dominate Latin America, is due to vague and unfounded fears and especially to an utter misconception of public opinion in this country. However, it is a persistent notion, constantly inculcated, and the illusion is one that interferes with efforts at coöperation. We should endeavor, so far as possible, to eradicate it, and especially should we be solicitous to conduct all our relations with Latin American States in such a manner as not to facilitate its spread.

Another illusion is that national aspirations can be changed by international conferences. The most that can be done is to find common ground, to show that some common undertaking is promotive of national benefit or

at least not opposed to national interest. Nations coming into conference do not change their fundamental viewpoints. A conference gives the advantage of discussion, of getting away from the routine and dilatoriness of diplomatic note writing, of informal contacts removing prejudices and giving a clearer understanding of reasons for action or inaction. Among friends, it is of the greatest value. But, despite the convenience of direct intercourse at conferences, there are certain difficulties inherent in the method itself. Delegates have instructions which they should follow. This sometimes prevents entire freedom in discussion. But it is better that governments should act through their representatives than that the latter should play a lone hand. Individual ambitions may have an important part in determining attitudes on particular questions. Then there are many matters which could readily be resolved if common sense could have its sway, but fear of misdirected popular criticism at home may prevent acquiescence. I was grateful for the publicity of proceedings at the Havana Conference. On the whole, it was helpful. But it must be recognized that publicity, not of action but in the discussions which must precede action, sometimes prevents reasonable adjustments.

Then, while a conference facilitates settlements which cannot be had by ordinary diplomatic exchanges, there are questions which should be dealt with by direct communications between particular governments and which cannot be successfully handled at a general conference. The tendency is to bring before a conference matters with which it is incompetent to deal, as one party or another may try to get the leverage of support through the introduction of a subject which is not of general concern. This suggests another illusion, which it is hard to destroy, that a conference should undertake questions which need diversity of treatment. For example, at the Havana Conference it was sought to deal with the question of frontier police. But it soon became apparent that there were different exigencies on different frontiers and that separate negotiations or agreements would be more satisfactory than a general convention. So, in relation to development of water power, diversity of treatment may be needed and the states directly affected may find it to their advantage to make particular agreements that are mutually acceptable.

The success of Pan American conferences will depend not only on a keen forward look, with broad vision, but also on a discriminating self-restraint. This illustrates the importance of careful preparation of the program for conferences and such preparation, fortunately, had been made for the Sixth Conference by the Governing Board of the Pan American Union. The subjects thus presented for consideration at the conference may be classified broadly as follows: (1) those relating to the organization and functions of the Pan American Union; (2) the codification of international law; (3) problems of communication; (4) various specific objects of coöperation; (5) plans for conciliation and arbitration.

The Pan American Union

This is the organ of Pan American coöperation, at once its symbol and instrument. The Union is in effect the permanent committee of the Pan American Conferences with general and particular duties assigned to it by the resolutions of the conferences. Its widening activities show the growth and direction of Pan American sentiment. First organized as a bureau under the administration of the Secretary of State of the United States, it was placed in 1902, by the Second Pan American Conference, under the control of a Governing Board composed of the diplomatic representatives of the American States with the Secretary of State of the United States as chairman. At the Fifth Conference, held at Santiago, Chile, in 1923, representation of the American Republics on the Governing Board was declared to be a matter of right and provision was made for the election by the Governing Board of its chairman and vice chairman. States having no diplomatic representatives accredited to the Government of the United States were to be entitled to appoint special representatives on the Governing Board. Desirous of providing a permanent basis of organization, the Governing Board, pursuant to a resolution of the Fifth Conference, prepared a project of convention on this subject which was submitted to the Sixth Conference. The wisdom of sacrificing the flexibility of organization under resolutions of the conferences to the rigidity of a convention, which if made effective by the ratification of all the American States could not be altered save by another convention also ratified by all, may be doubted. But in the discussions it became manifest that if a convention were to be adopted, it should be confined to a general outline of organization, appropriate for a constitution, and without the details which would be more satisfactorily provided from time to time by the legislation (resolutions) of the conferences. The result was the adoption of a simplified form of convention for submission to the respective governments and also of a resolution for the continuance of the Union under the resolutions already in force with certain modifications.

The significant action of the Sixth Conference in respect to the Pan American Union lay in its disposition of certain proposals as to organization and functions. Mexico proposed, and most ably and vigorously supported the proposal, that the Governing Board should be composed of special representatives of the governments appointed for that purpose; that there should be rotation in the offices of chairman and vice chairman annually in the alphabetical order of the countries, and that the office of Director General should be filled annually and be held in turn by the chairmen of the Pan American committees of the respective countries in similar alphabetical order. The selection of diplomats accredited to Washington as the representatives of the states on the Governing Board was criticized with charming naïveté. It was urged that an accredited diplomat of a Latin American Republic must be *persona grata* to the Government of the United States.

He was subject to the subtle influences of the capital at Washington. He was not the dependable, upstanding, or, as we should say, "one hundred per cent." representative that his country needed for the important duty of serving on the Governing Board of the Pan American Union. It was necessary, it was said, to "de-diplomatize" the Union. But these criticisms did not meet with favor. They found no support among those who were most intimately acquainted with the work of the Union. The committee dealing with these subjects had the advantage of the presidency of Dr. Olaya Herrera, and of the unremitting labors of its reporter, Dr. Jacobo Varela, both of whom had long been identified with the Union and had intimate knowledge of its problems. It was recognized at once by the delegates that the governments should be free to select any representatives they chose, but it did not appear that displacing their own diplomatic representatives would be to their advantage. Special representatives on the Governing Board, no less than the accredited diplomatic representatives, would act in accordance with the instructions of their governments. These instructions could be given to accredited representatives as well as to special representatives. The right, so rarely exercised, to refuse an *agrément* as to a proposed diplomatic representative could hardly be regarded as seriously interfering with the freedom of choice. Moreover, unless the work of the Union was to be embarrassed by interruptions and delays, special representatives would have to remain continuously in Washington and might be equally susceptible to the seductions of this delightful city and to the pleasant sense of comradeship which happily pervades the intercourse of those endeavoring to promote friendship and to reach reasonable adjustments. If the special representatives were continually in attendance, as they should be, the presence of two representatives of the same country, one as its minister or ambassador and another as its representative on the Governing Board of the Pan American Union, would not only largely increase the expense of representation but could hardly fail to impair the prestige of both, to say nothing of the prestige of the Union itself. The conference disposed of the question by recognizing the right of every government to appoint such representative as it desired and thus to displace its diplomatic representative if it saw fit. But to avoid any ground for a different construction of its action, the conference expressly provided that a government might select, as heretofore, its diplomatic representative to serve on the Governing Board.

The Fifth Conference had already provided for the free election of chairman and vice chairman on the Governing Board and the proposal for an artificial rotation was rejected. In the discussion it was made clear that the Government of the United States did not desire any special privilege in the organization of the Union, that the Secretary of State of the United States did not seek any position of prominence on the Governing Board, but that he wished to be considered a co-worker with his colleagues in advancing the purposes of the Union. As to the office of Director General, it was ap-

parent that continuity and not rotation was desirable. The tributes to the efficiency of the work of the present Director General were spontaneous and universal. The proposal for rotation in his office was withdrawn.

There was, however, a proposal made by Mexico as to the functions of the Union which met with approval. This was that the Union should not "exercise functions of a political character". The emphatic endorsement of this limitation was of the utmost significance. It may be difficult to define with precision what is meant by "functions of a political character," but the spirit and intent of the proposal cannot be misunderstood. It meant that the Union should not attempt to intrude upon the domain of the respective governments in relation to the policies which normally would be determined by them in the exercise of their proper authority and which lay outside the administrative activities, the duties of an educational and cultural nature, and the various inquiries and studies confided to the Union by the direction of the international conferences. The Pan American Union was to be an executive instrumentality of the conferences and an organ of coöperation along established lines of endeavor, but was not to be a means by which any state or group of states could obtain a leverage to affect the policy of other states in regard to questions which the latter wished to determine for themselves.

The attitude of the delegates to the conference in this matter disclosed the futility of plans for making the Pan American Union an arbiter of the policies or action of the American Governments. It was felt that any attempt of this sort would not only fail of its objective, but, if seriously prosecuted, would destroy the Union. I have frequently been amazed at the lack of proper appreciation, on the part of many who discuss this question, of the manner in which the Governing Board acts. The notion of this board as a tribunal or council of supervision or of general advice, as an instrumentality to deal with delicate international situations, takes no account of its actual constitution and methods. The members of the Governing Board represent their governments. They act under instructions. If any subject is brought before the board, which is not one of the merest routine, and does not fall within clearest precedents or past instructions, the request is at once made by the members of the board for an opportunity to consult their governments. And there are twenty-one of these governments, each insisting on equality. No action could be taken which would not be as directed by these governments, and most probably, in any matter of serious import involving the policies of one or more states, there would be division into groups and no effective action would be possible. There is no recognition of great Powers as maintaining and directing a permanent council. The decision that the Union should not have functions of a political character crystalized the general desire that no endeavors should be made by any government to use the Union to put even moral pressure on other governments, that is, to influence their action in matters where they desire to exercise their

independent authority as sovereign states. This not only indicated the strength of nationalistic sentiment, but also a shrewd perception of the only way in which the Union itself could be preserved.

Oddly enough, the preamble of the convention for the organization of the Pan American Union gave more trouble than any of the provisions of the convention. This was due to a determined effort, despite the adoption of the resolution denying functions of a political character, to make the Union a vehicle for disputes relating to tariffs or regulations for the import or export of commodities. The proposal was not a popular one and won no adherents. Manifestly, every American State has its views as to its import and export duties, its methods of raising revenue, its administrative regulations. It does not consider these artificial, but adopts such laws and rules as it believes to be in its interest. The Latin American States were as tenacious of their rights in this respect as is the United States and there was no desire at the conference, apart from the effort of a single delegation, to introduce the Pan American Union into that field. Questions between particular governments as to particular laws, regulations or imposts, are appropriately the subject for agreement, so far as possible, between these governments. The quickest way to end the usefulness of the Union would be to promote its intervention in matters where the realization of national interest is keenest. While the specific proposals in the interest of such a mistaken policy were rejected, the conference adopted a preamble for the proposed convention, and provisions defining the functions of their Union, which in their generality of description left nothing untouched with which the Union could appropriately deal. The specific resolutions of the conference entrusted the Union with a large number of special and varied undertakings for the purpose of effecting the declared purposes of the conference, of securing information on many subjects and arranging for numerous conferences of a special and technical character. Thus, while delimiting its work and protecting it from a premature and unwise intrusion into controversies which it could not successfully compose, the Pan American Union was placed on a firmer basis that ever before and its opportunities for usefulness as an administrative and informing agency of Pan American coöperation were greatly extended. This definite settlement of the status of the Union in itself made the conference important and successful.

Codification of International Law

In the field of public international law, twelve projects formulated by the Commission of Jurists at their meeting in Rio de Janeiro, were presented. These included the project for pacific settlement of international disputes, to which I shall refer later. There were also two projects embraced in this group, relating to Exchange of Publications and Interchange of Professors and Students which belonged in another category and accordingly the conference dealt with them in connection with proposals of intellectual

coöperation. Of the remaining nine projects, seven were adopted with certain modifications, that is, those concerning Status of Aliens, Treaties, Diplomatic Agents, Consuls, Maritime Neutrality, Asylum and Obligations of States in the Event of Civil Strife.

On the remaining projects entitled "The Fundamental Bases of International Law" and "States—Existence, Equality, Recognition," no action was taken and further consideration was postponed until the next international conference of the American Republics. The reason lay in the fact that one of these projects contained a fragmentary and inadequate declaration on the subject of intervention. It declared briefly and simply that "No state may intervene in the internal affairs of another." This reduced the problem of codification of the law on this subject to an engaging and delusive simplicity. There was no definition of "intervention" and none of "internal affairs." No distinction between action that was justified in certain exigencies, and action that was unjustified, was attempted. The learning, and the discriminating postulates, of international law found no place in the text. The manifest defect of the project lay in its failure to set forth the rights and duties of states in any manner that could be regarded as satisfactory and could thus provide an appropriate context.

Dr. Victor Maurtua, of Peru, the reporter of the committee dealing with this subject, pointed out these defects in a brilliant exposition and proposed four declarations—(1) of the fundamental bases of the codification of international law, (2) of the definitions and rules of application of international law, (3) on Pan American unity and solidarity and (4) in relation to the recognition of governments. Deeming it essential that the basis should be found in a statement of the principle of respect for fundamental rights, Doctor Maurtua proposed, as the first division of his report, the adoption of the declaration of the American Institute of International Law formulated at its first meeting in Washington in 1916. This declaration, prepared by the leading jurists of Latin America and the United States, and approved by many others abroad, is as follows:

> I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.
>
> II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.
>
> III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitled them."

IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.

VI. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable as such to all questions between and among the members of the society of nations involving its principles.

Strange as it may seem to an impartial observer, the submission of this fair and comprehensive statement provoked a debate. It was unwelcome to some who desired the adoption of the incomplete statement of the original project. Occasion was afforded for eloquent assertions of the rights of sovereignty, of the sacredness of independence, which no one had any desire to challenge. The declaration of the American Institute with its appropriate reference to the duties of states seemed to some to qualify the attributes of sovereignty. The balanced precepts of international law were thus in danger of being forgotten in the zeal for a trumpet call in defense of the ideal of liberty to which we are all devoted. The matter was referred to a subcommittee. It would have been easy to modify the language of the declaration of the American Institute so as to remove any possible ground for the suggestion—although such an interpretation seemed to be unwarrantable—that it impinged on sovereignty. Slight changes could have removed any possible ground for criticism. But there were some who refused to accept the declaration, insisting on the letter of the original project, and thus unanimity became impossible. In this situation, as we were dealing with the codification of international law which should have unanimous approval, a postponement of further discussion was deemed to be advisable. This partial failure was not without its compensations. It gave opportunity for frank interchanges in committee, in subcommittee, and finally in plenary session, which cleared the air, promoted a fairer appreciation of opposing views and made us at the close of the conference much better friends than we were at the beginning. We did not codify this part of international law, but we did better than that. We strengthened the ties which are deeper than the law and made firmer the mutual respect and confidence without which the law is of slight avail.

I cannot undertake at this time to discuss the principles of codification or to present the details of the projects which the conference adopted. It must suffice to say that in the adoption of seven projects gratifying progress was made in this most difficult of international enterprises. I may, however, suggest some reflections which do not detract from the importance of

the work thus accomplished. It is always necessary to guard against a particularistic tendency in an endeavor which can be successful only as there is a general acceptance of results. While the American Republics can make, and are making, a notable contribution to the effort of codifying international law, they cannot change, even with respect to themselves, the rights and duties of other states under international law. They will succeed only as they are able, with a comprehensive view and technical skill, to formulate not their particular doctrines but the *law*, which rests on the consent of all civilized states. At the Havana Conference it was frequently necessary to point out, as, for example, in dealing with the subject of maritime neutrality, that it would be a vain effort to seek to change the general law establishing the rights of all neutrals by a special agreement of the states which were represented at the conference. There may indeed be special cases justifying a limited departure. Thus, Bolivia is without access to the sea, and it was deemed appropriate to provide that in case of war between American Republics neutral states should permit the transportation of war materials through their territory to a state shut off from the sea, provided the neutral states should not consider that their vital interests would be affected by such action.

In codifying international law, the temptation is strong to endeavor to incorporate in the code not the law, but a mere political doctrine. Doubtless codification, even in the limited sense, will involve reconciliation of differences in statement and of points of view. But it is quite a different matter to abandon the rules of international law that are well known in order to set up different rules which suit the policies of particular states. New rules may be advisable, but it should be recognized that in proposing them one enters the field of legislation and success can be had, not in showing a past assent, but only in obtaining a new accord.

To the work of the codification of international law, a political conference is not well adapted. Even jurists as delegates to such a conference may lose their juristic detachment and their allegiance to the law may yield to their patriotic espousal of the policies which the governments of their countries desire to maintain. Still, a code of international law, in order to gain technical force, aside from the weight it may deserve as an exposition, must obtain the approval of governments and a political conference may be the ultimate means of securing this approval. Before such a conference, jurists must do their work with thoroughness and impartiality. And then, as it seems to me, before a final political conference is held to frame projects of conventions, there should be a preliminary conference in which not only distinguished jurists, but the foreign offices of governments, through the members of their official legal staffs, should participate so that any conflicting views of the legal advisers of governments may be known and if possible brought into harmony before a final political conference is convened. Governments appoint jurists for the preliminary work of drafting, with a com-

plete reservation as to the final attitude they will take as governments. When projects have been drafted, they are submitted by each government, I assume, to its technical legal staff and the views of the latter are most probably incorporated in the instructions to the delegates that deal with the projects. Thus, apparent agreements at meetings of commissions of jurists may prove to be illusory in the face of new difficulties raised in foreign offices even as to matters of law. Through preliminary meetings of jurists with the attendance of technical advisers of governments, some, if not all, of these difficulties might be removed. If, through such meetings, agreements on certain subjects cannot be reached, it will in most instances, as it seems to me, be idle to bring such matters to the decision of a political conference composed of delegates chosen with reference to governmental policies rather than for the appropriate formulation of statements of the law. The Havana Conference wisely adopted a broad resolution governing further endeavors in codification, and this resolution, as it seems to me, can be availed of to secure the necessary coöperation.

In the field of private international law, or what is ordinarily called conflict of laws, an advance of great importance was made at the Havana Conference through the adoption, with slight changes, of the Code of Private International Law prepared by Dr. Antonio Sánchez de Bustamante (the President of the Conference) as approved by the Commission of Jurists at their meeting at Rio de Janeiro. In view of our system of government in the United States, with our forty-eight States and our federal government of limited powers, the United States could not join in this action, but it viewed with sympathetic interest the efforts of the other American States to obtain legislative uniformity. The Bustamante Code was accepted by eighteen affirmative votes, with definitive reservations ultimately maintained by Argentina, Brazil, Salvador and the Dominican Republic. In addition, the conference passed a number of resolutions looking to further studies in this field and took appropriate action to secure the continuance of the necessary preparatory work by the Commission of Jurists. Thus the avenue is open for substantial progress before the next international conference.

The Conference approved the proposal of its committee for the creation of an International American Commission of Women to prepare studies on the subject of the civil and political equality of women, and recommended that the governments of the American States should study and adopt legal measures to concede to women certain rights which they do not at present enjoy in some of the republics. The resolutions of the Fifth Conference with respect to the arbitration of commercial disputes were again adopted. It was also recommended that the American States adhere to the Conventions of Brussels relating to Assistance and Salvage of September 23, 1910, to that of Naval Privilege and Mortgage of April 10, 1926, and to that of the Limitation of Responsibility of Ship Owners of November, 1922.

Problems of Communication

One of the most important achievements of the Sixth Conference was the adoption of a liberal convention relating to aviation. Inter-American commercial aviation is assured equality of treatment and facilities. On the suggestion of the United States, opportunity was given to the United States and Panama to agree with respect to air routes and terminals so that the Panama Canal may be properly safe-guarded without interfering with the legitimate demands of commercial communication. The interest of the United States in adequately protecting the Canal at all times and under all conditions was distinctly stated and freely recognized by all. The safe-guarding of the Canal by the United States is in the interest of all the American Republics.

Resolutions were adopted in relation to the Pan American Railway which, when completed, will connect the cities of the United States with those of South America. Two-thirds of the railway has already been constructed. There were also resolutions as to the construction of the Pan American Motor Highway through the Isthmus of Panama with two divisions reaching eastern and western South America. Facility in communication will bind us together with the indissoluble ties of multiplying and interrelated economic interests. In the most practical sense, we are just beginning our relations to Latin America.

Various Coöperative Efforts

I wish that it were possible to review the variety of interests which were considered by the conference and the numerous resolutions which were adopted evincing a sincere desire to promote coöperation in every practical way. This was especially manifest in relation to sanitation and to public health problems, and with respect to intellectual coöperation. Action was taken looking to the organization of a Pan American Geographical Institute, to the creation of an American Institute of Intellectual Coöperation, to the promotion of interchanges of professors and students, the establishment of scholarships and special foundations for instruction in Spanish, English, Portuguese and French, and the study of commercial legislation and of the history of the commercial and diplomatic relations of the American Republics.

There was provision for the calling and organization of a large number of special conferences, *e. g.*, of journalists, of commercial associations, of bibliographical experts, of students of pedagogy, of municipalities, and in relation to plant and sanitary control, trademarks, agricultural coöperation, communication statistics, and for many investigations of important subjects. It is through these special conferences and studies, rather than through the more spectacular political conferences that we may look for the most important results of the collaboration, not of the governments, but of the peoples of the American Continents.

Conciliation and Arbitration

This subject was reached too late to permit the conference to prepare a convention. An able report was submitted to the Committee on Public International Law by Dr. Ricardo J. Alfaro, of Panama. After a brief discussion all the questions presented were referred to a subcommittee composed of representatives of Brazil, Argentina, Chile, Peru, Colombia, Cuba, Panama and the United States. The subcommittee under the leadership of its chairman, Dr. Raul Fernandez, of Brazil, proposed the following resolution which was approved unanimously by the full committee and adopted by the conference:

> The Sixth International Conference of American States resolves:
>
> Whereas: The American Republics desire to express that they condemn war as an instrument of national policy in their mutual relations; and
>
> Whereas: The American Republics have the most fervent desire to contribute in every possible manner to the development of international means for the pacific settlement of conflicts between states;
>
> 1. That the American Republics adopt obligatory arbitration as the means which they will employ for the pacific solution of their international differences of a juridical character.
>
> 2. That the American Republics will meet in Washington within the period of one year in a conference of conciliation and arbitration to give conventional form to the realization of this principle, with the minimum exceptions which they may consider indispensable to safeguard the independence and sovereignty of the states, as well as matters of a domestic concern, and to the exclusion also of matters involving the interest or referring to the action of a state not a party to the convention.
>
> 3. That the Governments of the American Republics will send for this end plentipotentiary jurisconsults with instructions regarding the maximum and the minimum which they would accept in the extension of obligatory arbitral jurisdiction.
>
> 4. That the convention or conventions of conciliation and arbitration which may be concluded should leave open a protocol for progressive arbitration which would permit the development of this beneficial institution up to its maximum.
>
> 5. That the convention or conventions which may be agreed upon, after signature, should be submitted immediately to the respective governments for their ratification in the shortest possible time.

The Conference also adopted, on the proposal of Mexico, a resolution as follows:

> Considering:
>
> That the American nations should always be inspired in solid coöperation for justice and the general good;
>
> That nothing is so opposed to this coöperation as the use of violence;
>
> That there is no international controversy, however serious it may be, which can not be peacefully arranged if the parties desire in reality to arrive at a pacific settlement;

That war of aggression constitutes an international crime against the human species:

RESOLVES:

1. All aggression is considered illicit and as such is declared prohibited;

2. The American States will employ all pacific means to settle conflicts which may arise between them.

The subcommittee was of the view, and the full committee decided, that no change should be recommended in the provisions of the Gondra Convention which had been adopted at the Fifth Conference at Santiago. This convention has been ratified by the United States, Brazil, Chile, Cuba, Hayti, Mexico, Paraguay, Uruguay, Venezuela, Guatemala and Panama. It still awaits ratification by a large number of the signatory states. It provides for the establishment of commissions of inquiry to undertake the investigation of disputes which it has been impossible to settle through diplomatic channels or to submit to arbitration in accordance with existing treaties. The parties undertook not to begin mobilization or concentration of troops on the frontier of the other party, nor to engage in any hostile acts of preparations for hostilities, from the time steps are taken to convene the commission of inquiry until the commission has rendered its report (which must be within a year unless the time is extended by agreement) or until six months after the report, this time being available for renewed negotiations to bring about a settlement. It is hoped that this convention will soon come into force through the necessary ratifications. If a state joins in a declaration condemning war as an instrument of policy and desires to extend the range of arbitral settlement, it would seem reasonable to expect that it at least would ratify the Gondra Convention.

Under the resolution of the Havana Conference, the way is now open for a conference of plenipotentiary jurisconsults to be held in Washington during the current year to prepare an agreement for obligatory arbitration. That conference should have important results. It is apparent, however, from the terms of the resolution that an agreement for compulsory arbitration in all cases is not to be expected. Exceptions were suggested in Dr. Alfaro's report. The resolution of the conference itself suggests "the minimum exceptions" which may be considered indispensable "to safeguard the independence and sovereignty of the states," and the exclusion of "matters of a domestic concern" and also of "matters involving the interest or referring to the action of a state not a party to the convention." These are familiar categories of exception. The phrasing may be regarded as better than the old formula excepting questions affecting "vital interests" and "honor." Any question, however appropriately justiciable, might come under such a description as the last mentioned, which makes an agreement for arbitration an engagement solemn in form but one which might be without force in fact when most needed.

But it should be observed that appropriate exceptions to an agreement to arbitrate, made as definite as possible and relating to matters which the American States would not, in any event, consent to arbitrate, are not inconsistent with the renunciation of war as an instrument of national policy. A nation may be unwilling to arbitrate a question which it would have no idea of fighting about, except in self-defense. Domestic questions afford an illustration. This country may refuse to submit controversies over its immigration laws to arbitration, but it has no reason to believe that any question as to the policy of its exercise of authority over such a subject would lead to war. Reservations as to sovereignty and independence, domestic questions, and matters relating to the interest or action of states not parties to the convention, are really intended to prevent intrusion and pressure in relation to matters not deemed to be justiciable. Although the right to demand arbitration is denied, complaints may be withdrawn or modified and amicable settlements may be found.

Granted the propriety of such exceptions as the resolution indicates, there still remains a broad opportunity for the arbitration of justiciable disputes lying outside the exceptions, and in this field provisions should be made for obligatory arbitration. Nations which renounce war cannot do less than provide this remedy wherever it is practicable. Not to provide it in cases of "international differences of a juridical character," as the resolution phrases it, would be to show slight interest in the practical institutions of peace.

But if we are to have obligatory arbitration of justiciable disputes which are not within excepted categories of a definite character, it will be necessary in this country to have an important advance in policy. Let me recall the history of the past thirty years in relation to this matter. During the Cleveland Administration there was a strong public sentiment in favor of a general arbitration treaty between the United States and Great Britain, this being considered a step toward a similar plan for all civilized nations. The Olney-Pauncefote Treaty was signed in 1897, with provisions for compulsory arbitration having a wide scope. This treaty was supported not only by President Cleveland but President McKinley strongly endorsed it in his annual message urging its early approval "not merely as a matter of policy but as a duty to mankind." But, notwithstanding the safeguards established by the treaty, the provisions for compulsory arbitration were not approved and the treaty failed. In 1904, Secretary Hay negotiated a number of arbitration treaties. He limited the provision for obligatory arbitration to "differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy." Even with this limitation, there was the further proviso that the differences should be such as "do not affect the vital interests, the independence, or the honor of the two contracting states and do not concern the interests of third parties."

It was also provided that the parties should conclude a special agreement in each individual case "defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure." This provision was amended in the Senate by the substitution of the phrase "special treaty" for "special agreement," so that in every case of arbitration it would be necessary to make a special treaty with the advice and consent of the Senate. In view of this change, Secretary Hay announced that the President would not submit the amendment to the other governments. The Hague Conventions of 1899 and 1907 do not make recourse to the arbitral tribunal compulsory. In approving the Second Hague Convention, the Senate, after repeating the declaration of reservation made on behalf of the United States in connection with the First Hague Convention, specifically resolved that the approval of the United States was "with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute," and that the "*compromis* required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties unless such treaty shall expressly provide otherwise." The arbitration treaties subsequently negotiated by Secretary Root expressly stipulated that the special agreement for each individual arbitration should be made by the President by and with the advice and consent of the Senate.

In 1911, the Taft Administration submitted to the Senate broad arbitration conventions with Great Britain and with France. There was a provision that in case a question arose whether a particular difference was subject to arbitration under the treaty, the issue should be settled by a proposed joint high commission. This provision was struck out in the Senate which also added a number of limiting reservations. In the amended form, the treaties were not acceptable to the administration and remained unratified.

The arbitration treaties recently signed and proposed to take the place of the Root treaties define more precisely the classes of questions to be excepted and also contain the provision for a special agreement to be made with the approval of the Senate in the case of each submission to arbitration.

It is appropriate, of course, in the case of a submission to arbitration under a general arbitration treaty that there should be a particular agreement, or *compromis*, providing the details of procedure in the given case, or that provision should be made for determining these details if the parties are unable to agree. It is also true that the Senate is not likely to refuse approval to a *compromis* under a treaty of compulsory arbitration when the case is not considered as falling within the exceptions, the provision for approval in such a case being deemed to be merely procedural. But it is

evident that great importance must attach to the definiteness of the exceptions provided in the treaty, as the more loosely these are stated the greater is the danger that the treaty will be ineffectual to accomplish its purpose, if at the time of dispute there is an indisposition to resort to arbitration. If we are prepared to join in an agreement for obligatory arbitration with the Latin American States, we should know precisely what it means and have no stipulations which could be regarded as a reservation of the right to refuse arbitration in the cases which lie outside the excepted classes.

I trust that in the interest of our relation to the promotion of peaceful settlement of international controversies, the United States may be in a position to meet her sister republics of Latin America in the coming arbitration conference with a clear-cut policy for genuinely obligatory arbitration of justiciable questions. Is it not possible to have appropriate exceptions plainly set forth, and in cases which are not within the exceptions, to have the agreement to submit to arbitration in such terms that all parties to it will recognize the obligation as being definite and inescapable? We could make no more hopeful endeavor to cement our friendship with Latin American countries or to justify the leadership we desire to take in the cause of peace.

In conclusion permit me to give you a few personal impressions of the atmosphere of the conference, of men and methods. The Cuban Government and the Cuban people were most generous hosts. The beautiful and commodious buildings of the university were placed at the command of the conference and every facility was provided for the meetings of committees and for plenary sessions. The visit of President Coolidge was greeted with enthusiasm and President Machado gave lavishly of his time to attest his deep interest in the proceedings. The delegates from the Latin American countries were men of exceptional ability. Among them were many distinguished jurists. They were men of large experience, with broad knowledge of affairs. It was a high privilege to come into intimate association with men of such character and distinction. Much is made of the differences between the Latin American and the Anglo-Saxon temperaments. The differences undoubtedly exist, but aside from the use of a different language, there was little to distinguish the assembly from those gatherings to which we are accustomed. For the most part the proceedings were direct and without more lost motion than is characteristic of conferences everywhere. I should expect as much prolixity, if not more, in our legislative bodies. Even the barrier of language, I was happy to find, was not a very serious one. A great deal was accomplished in a relatively short time. We had no filibusters.

The atmosphere of the conference was friendly. The constant association of the delegates brought them into fairly close intimacy and they learned to know each other well. This tended to promote esteem and to remove distrust. If there were any cabals, they did not prosper. Peoples cannot know each other in the abstract. We judge nations by the men we meet

rather than by the books we read. Whatever else may be said of the results of the conference at Havana, representative men met and learned to work together to the advantage of all our countries.

President HUGHES. I have been speaking of Latin American relations. There is a great nation in this hemisphere whose representative we are very glad to welcome here tonight, a nation that is a member of the Commonwealth of Nations that we call the British Empire, a nation in which we are deeply interested, not simply because of our propinquity but because of the ties of a common inheritance, a common vision, a common purpose. We are glad to think of our neighbor as achieving a new status in the international world, as a member, with the rights which our friend will endeavor to explain to us, of the society of nations. Nothing could be more agreeable to the Government of the United States, to the people of the United States, than to have most intimate relations with the Government of the Dominion of Canada.

I have great pleasure in introducing to you Mr. Justice B. Russell, who will talk to us on "The Status of Canada from an International Point of View."

Mr. Justice B. RUSSELL. Mr. President, ladies and gentlemen: I don't want to be the first person, member of the International Law Society, to violate the rules of the Society and, therefore, I am not going to undertake to express adequately—I am going to express to a certain extent, but I cannot adequately express, the thanks that I owe to the management of the International Law Society for the very prominent position on the program that has been given to my country. Nor can I at all adequately express the admiration which all the members of my profession in Canada, and indeed the people of Canada generally, entertain for the President of this Society both because of his well-won eminence as a jurist and his great and important achievements as a statesman. If I were to attempt adequately to express those feelings which arise in my breast I am afraid I would have to ignore the rule of the Society which I do not wish to do. Time passes swiftly and therefore I plunge at once *in medias res.*

CANADA'S INTERNATIONAL STATUS

By Hon. Benjamin Russell

Formerly Justice of the Supreme Court of Nova Scotia

In a series of brilliant lectures delivered at Columbia University in January, 1925, Mr. Alfred Zimmern discusses the constitution of what he calls the Third British Empire. The first Empire he considers as having been ended by the secession of the Thirteen American Colonies. "The second British Empire reached the culmination of its power and of its

development in the Great War. And now a third Empire has come into existence, new in its form, new in the conditions which it has to face within and without its borders, new even in its name." In the novelty last mentioned the learned lecturer refers, of course, to the substitution of the title of "Commonwealth" for that of "Empire," the new designation having been first popularized by General Smuts in a series of war speeches, and afterwards consecrated by its use in the treaty under which the Irish Free State was created in 1921. Several years before Mr. Zimmern's effort, Professor Pollard, of London University, published an essay entitled "The Paradox of the British Empire," reminding us of Voltaire's jest at the expense of the Holy Roman Empire, which that world-renowned satirist said had been so named because it was neither holy nor Roman nor an empire. "The British Empire," says Professor Pollard, "is not quite so paradoxical because it is at least partially British, but it is only an Empire in a sense which makes nonsense of the word, for it is like no other Empire that ever existed, and it would certainly smell as sweet if 'called by any other name'."

Mr. Zimmern considers that this anomalous aggregate of human societies, call it by what name you will, has undergone changes of a serious nature in its internal and external relations since the beginning of the Great War, and it is the purpose of his lectures to describe its present position, to define the relations of its members one to another, and the relation that it bears as a commonwealth of nations to the rest of the civilized world.

Those relations purport to be set forth in the report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926. The committee frankly express the opinion that nothing would be gained by attempting to lay down a constitution for the British Empire. They suggest that its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution, while, considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried. Nevertheless, even from a strictly constitutional point of view, the position and relations of Great Britain and the several Dominions may be readily defined. "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."

Mr. Ewart, a very distinguished Canadian publicist, who for some years has been devoting the best energies of his life to the effort to separate the Dominion of Canada from the British Empire, tells us in his latest deliverance that there is no such thing as the British Commonwealth of Nations, but until he offers some reason for so strange a statement we may feel safe in relying on the report adopted by the strongest body of statesmen that could be got together within the compass of the British Empire.

It remains to be seen whether the ideal equality of all the members so associated can be preserved in the actual conditions that must from time to time present themselves. Sir Robert Borden, in one of his closely reasoned lectures at the University of Toronto, refers to a pronouncement of the late Earl of Oxford as recent as 1911, at the Imperial Conference of that year, in which he affirmed that "in respect of such grave matters as the conduct of foreign policy, the conclusion of treaties, the declaration of war, and indeed all relations with foreign powers, the authority of the Imperial Government could not be shared and must be exercised by that Government subject only to its responsibility to the Imperial Parliament."

The policy thus propounded, Sir Robert affirms, would tend towards the disruption of the Empire, and he asks how it is possible for the Empire to endure if the Dominions are to be without voice as to relations or commitments that may involve them in war. There can be no doubt that the pronouncement of Mr. Asquith, as he then was, went far beyond the necessities of the situation, and that Sir Robert Borden is within his rights in insisting upon every possible opportunity being given to the various members of the Commonwealth to advise upon the policies to which they are to be committed. And yet, when it is urged that no war can ever be properly entered upon by what used to be called the Imperial Government—and will still be so-called for many long years,—except after consultation with every member of the Commonwealth, one cannot help thinking what might have happened in 1914 and the few following years to the British Empire, including Canada and all the rest of the self-governing Dominions, not to mention the possibility of disastrous consequences to other communities throughout the civilized world, if no declaration of war could have been launched and no armed forces set in motion until the Canadian Government and the Governments of Australia, New Zealand and South Africa, had been consulted as to the propriety of a declaration of war against the Central Powers.

What the relative positions of Great Britain and the several Dominions may become in the course of fifty years, or even twenty years, from the present, one would not care to predict, but contrasting the comparatively carefree spirits and lightly burdened shoulders of the Dominions with the "labor dimmed eyes," the exhausting sacrifices of the mother-land and the staggering burdens imposed upon the shoulders of "the weary Titan," I think it is easily possible for us to be too sensitive as to the right of the Dominions to be consulted at every turn in the kaleidoscopic changes of front presented by the political movements of powers great and small in every quarter of the globe. So far as situations can be foreseen and problems of statecraft anticipated, the Dominions have an undoubted right to be taken into consultation, and a refusal of such right, as Sir Robert Borden has said, must lead in the end to the dissolution of the Empire. But emergencies can easily be imagined, unforeseen situations calling for immediate action on the part of the government nearest to the probable centre of disturbance when op-

portunities might be lost or even disasters occasioned if no action could be taken that had not had the sanction of the various Dominions in all parts of the world. As to such cases a fair solution seems to have been arrived at to the effect that no Dominion is held to be bound by any engagement entered into as to which it has not had an opportunity to be heard and to decide as to its course of action, or of inaction.

It is in connection with this branch of the subject that Mr. Zimmern, in one of his lectures at Columbia University, refers to the invitation sent by Lloyd George to the Dominions to assist in the defence of the Dardanelles in September, 1922. "Up to 1914," he says, "it was assumed that when Great Britain was at war the Empire was at war. In September, 1922, however, this theory was unexpectedly put to the test and emerged greatly weakened. The Greek army had been routed by the Turks, who pursued it to the Dardanelles, where at the port of Chanak, they were held up by a British detachment. The Government of the day, holding the defence of the Dardanelles to be a major British interest, was prepared to resist a Turkish attack by force of arms and called to the Dominions asking for their coöperation. The Canadian Premier refused to pledge himself to a favourable answer. 'Under our system of responsible government,' he stated, in the Canadian House of Commons, 'the Canadian Parliament should determine except in the case of actual invasion, whether the country should participate in wars in which other nations or other parts of the British Empire may be involved.'"

"Fortunately," says Mr. Zimmern, "the crisis passed, but its lesson remains. For the first time a member of the British Commonwealth claimed the right to decide for itself whether it should go to war or remain neutral, when Great Britain was involved in hostilities."

What I wish to say about this alarming statement is that I cannot agree with Mr. Zimmern that the theory that when Great Britain is at war the Empire is at war has in any manner or to any extent been weakened by the doctrine enunciated by Mr. King, and I must further dissent from the statement that on the occasion referred to Canada claimed the right to decide to remain neutral when Great Britain was involved in hostilities. But before discussing this issue more closely, I should like to draw attention to the impression that seems to underlie this paragraph, or rather the impression that it would create in the mind of the casual reader unfamiliar with Canadian history, that the participation of Canada in the wars of the Empire was one of the commonest things in the world. It would never be inferred from Mr. Zimmern's statement that Canada had never participated in any British war until quite near to the beginning of the present century. The nearest she ever got to such a participation before the date mentioned was the occasion (1882) on which a company of Canadian boatmen was furnished to assist in the transportation of men and munitions on the Nile. But this service was rendered under an explicit stipulation that the whole cost of the

expedition should be defrayed by the Imperial Exchequer. One of our most active, prominent and influential statesmen, the late Sir Charles Tupper, had always contended by tongue and pen that there was no call for us to come to the assistance of Britain in her wars, that the building of the Intercolonial railway,—really a military road,—and our other expenditures in the development of Canada, had fully discharged all our obligations to the mother country. Notwithstanding the lifelong adherence of this distinguished statesman to the view that Canada had no call to participate in British wars, my memory has betrayed me if his was not the first, as it was certainly the loudest, voice that proclaimed the necessity of our immediately organizing Canadian contingents to assist the British Government in overcoming the forces of Kruger in the Transvaal. There is a very obvious explanation of this sudden abandonment of a life-long attitude, but it would have no relevancy to the question under discussion.

Through all the wars in which Great Britain was engaged from the time that Canada acquired responsible government, the Crimean War, the Indian Mutiny, the Chinese War, the Zulu War, the Wars in Afghanistan, I presume that we fully understood that as a constituent part of the Empire, Britain being at war, we could not be neutrals. There was never a question whether we should remain neutral when England was at war. In recent, or comparatively recent years, there was a question occasionally raised, though generally settled *sub silentio* in the negative, whether we should or should not participate in the wars of England or contribute to the cost of their prosecution. That is a very different thing from an assertion of neutrality.

The question whether a change has been made since the commencement of the Great War by virtue of which we are now enabled to say whether we shall remain neutral or not, seems to be treated by Mr. Zimmern as one which we ourselves are competent to decide, and Mr. Ewart, to whom I have already referred as a very eminent Canadian publicist, seems to be of the opinion that it has already been decided that we have nothing whatever to do with the wars of England, being to all intents and purposes an absolutely independent state, or at the very least on the verge of becoming such a state when a few little anomalies, such as the Colonial Laws Validity Act, and one or two other out-of-date conditions, are reduced to the anticipated and intended terms. My submission as to this point would be that it certainly was never intended by the Imperial Conference or any of its members that Canada or Australia or New Zealand or Ireland should become an independent state and a separate and distinct international person. The South African representative may have had some such dream, but as Mr. H. Duncan Hall, a professor in Syracuse University, tells us, "General Hertzog went back to his country to declare his faith in the British Commonwealth and to pledge himself to a policy of coöperation and that he should proclaim that not five per cent of the people of South Africa desired separation."

It does not seem to have occurred to Mr. Zimmern or to Mr. Ewart,

so far as I am familiar with his voluminous writings, that the question we are at the moment considering is really a question of international law, and as such must be decided by reference to all the circumstances governing the solution of the problem.

One of those circumstances seems to me to have been unduly pressed by Mr. Ewart in his latest deliverance in which he claims an independent status for Canada because she has been accepted as a member of the League of Nations, nobody suggesting, as he observes, "that she lacked international qualification." I think it is more than possible that Mr. Ewart has not given due consideration to this branch of his argument. The Covenent of the League in its very first article provides that "Any fully self-governing state, Dominion or Colony may become a member of the League." These words were used several years before the Imperial Conference of 1926, on which Mr. Ewart is now resting his claim that Canada is an independent state. If the words "self-governing state" stood alone, there would be much to be said for Mr. Ewart's argument. But the words "Self-governing Dominion," seem to fit like a glove the acknowledged position of the Dominions at the time when they were used in the Covenant of the League, and I do not think the term "colony" would ever in modern usage be applied to a political society that had become completely separated from its mother country. Moreover, what would Mr. Ewart say about India one of the members of the League of Nations? Did her admission as a member of the League imply absolute independence and separation from the British Empire? If not, why should such membership effect the separation of Canada or any of the other dominions?

It seems very clear from what has been said that the Covenant of the League was never meant to confine its membership to absolutely independent states, nor can any valid reason be given why an organization which includes as members such states as the small and comparatively insignificant states of Central America, should exclude the great Dominions of Canada, Australia and the Irish Free State, simply because they happen to be members of a larger commonwealth of nations."

It was at one time thought that the claim of power to make a commercial treaty involved an assertion of political independence. When Mr. Blake moved a resolution in the House of Commons in 1882, proposing that Canada should be enabled to enter into commercial treaties on its own account with any British possession or foreign state, Sir John A. Macdonald said, "Disguise it as you will, this means separation and independence." Mr. Ewart says, if my memory serves me, that it was on this occasion that he made his famous and widely welcomed declaration, "A British subject I was born and a British subject I hope to die." The words were certainly used on this or on some other occasion. Mr. Ewart seems to consider this declaration of Sir John's imperial patriotism as merely, what you would call in this country, a piece of "political hokum," but no reason is given for such an injurious

judgment. Whatever may have been the failings of the man whom Mr. Ewart describes as "in reality a splendid Canadian," there was never a period in his life when he was not sincerely insistent upon the maintenance of the political connection with the mother country, and I must confess that were it not for the checks and guards adopted in the resolutions of the Imperial Conference of 1923, and embodied in the more comprehensive statement of 1926, I do not myself see how there could be any satisfactory answer to the contention of Sir John A. McDonald in 1882, or the similar contention of Sir George Foster on a similar proposal just ten years later. But the detailed provisions referred to and embodied in the report to the conference of 1926, seem to make it as clear as Canadian daylight that the treaty-making powers conferred on the members of the Commonwealth do not involve any political separation or thought of separation between the mother country and the Dominions. When was it ever considered that an independent state about to enter upon a treaty with some other independent state should be held bound to exchange views with a group of states not immediately concerned in the subject of the treaty, or that such an outside group of states should be informed of the proposed negotiations in order that they should have an opportunity of expressing their views? These provisions as to the negotiation of treaties, so far from having the effect of an assertion of independence, seem to point in the very opposite direction and to strengthen the contention that no change has been made in the international status of the Dominions.

Just one more of Mr. Ewart's contentions and I shall have concluded. His pet illustration of the relation that should exist between Canada and Great Britain is that of Hanover under George III as elector and Great Britain under the sovereignty of the same person as King. The union between England and Hanover was, he says, a mere "personal union," and such must become, if it is not already, the relation of Canada to Great Britain. Now such a relationship might perhaps be conceivable between Great Britain and the several Dominions were it not for the description of the central Kingdom and the several Dominions as united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations. The draughtsman of this report had no thought that he was changing the real union, which had undoubtedly existed down to the date of his report, into a merely personal union such as would have rendered war a between Canada and Australia a permissible and perfectly normal proceeding. The conference that adopted this report undoubtedly looked upon the common allegiance to the Crown as the symbol and guarantee of the continuance of their indissoluble union.

Let me conclude this discussion with the pronouncement of one of the highest authorities on international law with whose writings I am acquainted. I refer to Dr. A. Pearce Higgins, the editor of the eighth edition of Hall's well known and highly authoritative treatise on international law. Dr.

Higgins was familiar with every authority and every discussion bearing upon the question we have been considering, Keith's *War Government of the Dominion*, H. D. Hall on *The British Commonwealth of Nations*, the discussion in the *Journal of Comparative Legislation* on the "Imperial Crown and the Foreign relations of the Dominions," the article by Mr. M. M. Lewis in the *British Year Book* on the "Canadian American Halibut Fisheries Treaty," Mr. Keith's article in the *Journal of Comparative Legislation* on "The International Status of the Dominions." Let us hear what this competent judge has decided after the fullest consideration of every available authority bearing upon the question we have been discussing. These are his words. "Should war be declared against Great Britain by another state, it still appears to be the case that all the Dominions of the Crown would be involved. For the general purposes of international law, except for League of Nations proceedings, it is not believed that any one of the self-governing Dominions possesses international personality apart from the whole Empire."

President HUGHES. We shall now have the pleasure of listening to the report from the Special Committee for the Progressive Codification of International Law, which will be presented by Professor Jesse S. Reeves, the Chairman of that committee.

Professor JESSE S. REEVES (Reading):

REPORT OF THE SPECIAL COMMITTEE FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW

The Committee of this Society on behalf of which I have the honor to make the present report was created in 1925 in response to an invitation from the Secretary of the League of Nations requesting the coöperation of the Society with the Committee of Experts appointed by the League to study the question of the progressive codification of international law. At the time of its creation the Council of this Society welcomed the invitation so extended and noted with great satisfaction the progress made under the auspices of the League of Nations towards the initiation of a process which it was hoped would lead to the development of international law in various fields. The Council of this Society accepted, therefore, the invitation of the Committee of Experts of the League of Nations to collaborate in its work. The extent of this collaboration was limited to the making of suggestions of topics deemed to be suitable for codification and more or less ripe for consideration looking toward that end.

By April of 1926 there had been adopted by the Committee of Experts at Geneva some score of topics as more or less suitable for consideration. As a supplement to this list this Committee, with the approval of the Council of the Society, submitted five additional topics as falling within the range of possible codification, namely, (1) state succession, (2) criteria of *de facto* recognition of new states and new governments, (3) canons of interpretation of treaties, (4) international servitudes, and (5) the status of aliens. None of the subjects suggested by this Committee was adopted for consideration by the Committee of Experts at Geneva. While the Committee of Experts had sought for additional topics, the results of their plan of working tended toward a drastic reduction of topics for consideration. Ultimately examination was made by the Geneva Committee of eighteen topics and after exhaustive reports had been made upon a number of these a detailed questionnaire was prepared covering seven of the topics and this questionnaire was sent to the governments of

about fifty countries, both members and non-members of the League of Nations, the United States being included in the number. The replies of thirty-odd governments having been received, they were examined and analyzed by the Geneva Committee, with the ultimate result that of the seven topics upon which questionnaires were based three were selected as sufficiently ripe for consideration at an international conference.

With the presentation of the Geneva Committee's report first to the Council and later to the Assembly of last September the process of codification under the auspices of the League of Nations proceeded to its second stage. The Assembly provided for a new committee to be known as the Preparatory Committee for the Codification Conference to be proposed at The Hague during the year 1929. The Assembly accepted the recommendation made by the first committee, to submit for examination at the proposed conference three topics, namely, nationality, territorial waters, and the responsibility of states for damages done in their territory to the person or property of foreigners, these topics having been deemed as sufficiently ripe for consideration by an international conference. The Assembly entrusted the Council with the appointment of "a Preparatory Committee composed of five persons possessing a wide knowledge of international practice, legal precedents and scientific data relating to the questions coming within the scope of the first Codification Conference." The Acting President of the Council then appointed the following persons to serve on this committee: Professor Basdevant of France, Counsellor Carlos Castro Ruiz of Chile, Professor Francois of the Netherlands, Sir Cecil Hurst of Great Britain, and Mr. Massimo Pilotti of Italy.

This Preparatory Committee under date of February 15 last, distributed to the Council, the members of the League, and other governments a statement entitled "Schedules of Points drawn up by the Preparatory Committee for Submission to the Governments." This was done in order that in advance of the forthcoming conference as full and precise information as possible might be had from the various states, derived from three points of view:

(a) The state of their positive law, internal and international, with, as far as possible, full details as to the bibliography and jurisprudence;
(b) Information derived from their practice at home and abroad;
(c) Their views as regards possible additions to the rules in force and the manner of making good existing deficiencies in international law.

The Schedules of Points really amount to a detailed questionnaire upon the three topics to be considered at the forthcoming conference, namely, nationality, territorial waters, and the responsibility of states for damage to foreigners. A copy of this document was sent to this Society, but as it is addressed to governments only the coöperation of this Society is not asked in connection with the various matters set forth in it. As a society, therefore, it would seem that its official coöperation is not invited with reference to the forthcoming conference. As an important undertaking, however, the Society cannot fail to have a very definite interest in it and it is the belief of this Committee that this Society might well express its continued interest in the process of codification and its gratification in the prospect of the conference now proposed to be held at The Hague for the purpose of codifying the law upon three important topics of the public international law of peace. This Society has, of course, no official connection with the Government of the United States, but this Committee ventures to suggest that this Society may express the hope that the Government of the United States may see its way clear to the acceptance of the invitation to participate in the forthcoming conference. The replies heretofore made by the Government of the United States to the various questionnaires sent out by the Preparatory Committee are a welcome indication of its interest in this significant and important international endeavor and of its probable acceptance.

The Committee has not been able, being without financial resources, to undertake, even if it had so desired, a scientific study of the three topics upon the agenda of the proposed conference. It has, however, been able to bring to the attention of the members of the

Society and of the public generally the documents put forth at intervals by the Preparatory Committee at Geneva by republication of these documents in the pages of the Society's *Journal*. Soon after the announcement was made from Geneva that a codification conference would be held in 1929 some of the members of the Society, several of them being at the same time members of this Committee, felt that there might be properly instituted in the United States scientific study of the three topics proposed, the results of which might be available not only to the Government of the United States but to the public generally. Such an investigation, however, involved, first, organization and, second, funds for the prosecution of the work. Thanks to the initiative of a group associated with the Faculty of the Harvard Law School a grant of funds was secured for the purpose of conducting such an investigation. An organization entitled "Research in International Law of the Harvard Law School" was perfected at a meeting held at Cambridge on the seventh of January last, which included an Advisory Committee of some thirty-odd members under the chairmanship of the Honorable George W. Wickersham, a member of the Committee of Experts of the League of Nations. All of the members of your Committee, thirteen in number, are members of this Advisory Committee, as is the Director of Research, Professor Manley O. Hudson. At this meeting Dean Roscoe Pound made an opening statement in which he said, "It would indeed be unfortunate if American legal scholars were to neglect to take an adequate part in the work of preparation; if the views of American lawyers were not made available for the conference in matured form and in an adequate formulation. But this means that drafts or projects, embodying American views, even if American views from a universal rather than a national standpoint, and the results of American scholarship and American experience, should be put before the Conference or at least put at its disposal."

Although an account of the meeting for organization of the committee duly appeared in the pages of the Society's *Journal* it seems not inappropriate in this report to draw attention to the method of organization of the Research Committee. Provision was made for the division of the Advisory Committee into three groups of advisers according as the various members indicated their preference for and more immediate interest in the three subjects for investigation. The general plan of conducting the research adopted followed that of the Institute of International Law and the American Law Institute. For each of the three topics a reporter was selected, the reporter upon Territorial Waters being Professor George Grafton Wilson, the reporter upon the subject of Nationality Mr. Richard W. Flournoy, Jr., and the reporter upon the subject of Responsibility of States Professor Edwin M. Borchard. Associated with each of these reporters is a small body of Advisers. A grant of funds made by certain foundations permitted the immediate undertaking of the various tasks by the reporters and their advisers. It is gratifying to record the very substantial progress made in the investigation of these topics under skilled direction and leadership.

There have been two meetings each of the reporters and advisers upon the subjects of Territorial Waters and State Responsibility and one upon the subject of Nationality. No attempt has been made as yet to prepare a draft legal statement upon any of the three topics. At the meeting for organization the suggestion was adopted by the committee that in the researches to be undertaken three things should be kept in view:

(1) A statement of generally accepted views.
(2) A statement of the precedents applicable and if possible the weight of authority.
(3) A statement of what ought to be accepted in accordance with the principles of international justice.

The investigations so far undertaken and the discussions had with the various groups of advisers have been confined to the first two of these principles and this part of the work would seem to be at the present time fairly on the way toward accomplishment.

The Director of Research permits your Committee Chairman to set forth the following as the program of future work:

> It is hoped that a first draft of each subject may be placed in the hands of the members of the Advisory Committee in order that they may study it during the summer

vacation. If possible, the three drafts will be sent out to the members of the Advisory Committee not later than July 1, 1928, and they will be asked to submit their criticisms in writing to the reporter by September 1, 1928. The situation should then admit of calling a third meeting of the Advisory Committee during the first week in October, 1928, for a joint consideration of the first drafts. If the Codification Conference is not postponed to 1930, it will be necessary to complete the final drafts during the early months of 1929, and it may become necessary to have further meetings of the Advisory Committee during the later months of 1928. Before any final text is agreed upon, at least two preliminary drafts will have been placed in the hands of the members of the Advisory Committee, and this number will be increased as necessary.

This summary report made on behalf of the Committee is largely for the purpose of making the Society informed as to what is being done constructively in this country at the present time in the matter of codification. This Committee is not empowered to engage directly in such activity nor in any way to commit the Society with reference to any particular statements of international law. Created as a committee looking toward coöperation with the efforts of the League of Nations to codify international law it believes that at the present it has sufficiently performed its duty by drawing attention to the important constructive work now being carried on. The interest of the Society in the three topics upon the agenda for the proposed Hague Conference of 1929 is sufficiently indicated by the fact that the program of the present annual meeting of the Society is largely devoted to a consideration of these three topics. This report, therefore, read at this time may be regarded as in a sense a prefatory note to the general proceedings of these sessions.

The Committee at this time recommends, first, that the Society express its approval of the present scientific undertaking, and, second, that it express its desire to coöperate with the Committee on Research in International Law by affording opportunity and space in the Society's *Journal* whenever practicable for the publication of the results reached by the Research Committee. By so doing it believes that there will tend to be created a sound public opinion in the United States and elsewhere without which the progressive codification of international law cannot be realized. And, finally, that this Society expresses its approbation of the attitude of the Government of the United States in making responses to the inquiries of the Committee of Experts and the hope that there will be full participation by the Government in the proposed Hague Conference.

Respectfully submitted,

(Signed)

J. W. Garner	Quincy Wright	E. M. Borchard
C. K. Burdick	P. B. Potter	A. K. Kuhn
E. D. Dickinson	P. C. Jessup	J. B. Scott
E. C. Stowell	M. O. Hudson	J. S. Reeves
G. G. Wilson	P. M. Brown	

March 26, 1928.

President Hughes. No action upon this report, which has been most interesting, is required at this time. I assume it will come before the Council for its consideration in the regular course.

Before we take up the regular order of business let me emphasize the statement made by Professor Reeves. Tomorrow we shall have in our three sessions an opportunity for the consideration of carefully prepared papers upon these topics, which are to be the subject of the consideration of the conference in 1929. Tomorrow morning Mr. Bouvé will give an address on "Nationality." Mr. Bouvé is the American Agent of the General Claims Commission, United States and Mexico, and after his address there will be an opportunity for the discussion of that subject. In the afternoon at 2.30

there will be an address on "Responsibility of States for damage done in their territory to the person or property of foreigners." The address will be made by Professor Charles E. Hill of George Washington University. There will be an opportunity for discussion of that subject after the address. Tomorrow evening we shall have an address on "Territorial Waters" by Professor George Grafton Wilson of Harvard, and there will be an opportunity for discussion of that subject after the address. So you see tomorrow will be a day devoted to the consideration of these specially selected topics.

It will now be in order to receive a suggestion as to the nomination of members of the Committee on Nominations for officers of the Society.

ELECTION OF COMMITTEE ON NOMINATIONS

Mr. CHARLES HENRY BUTLER. I believe we nominate five. I nominate for that committee Mr. Hollis R. Bailey, Mr. Frank E. Hinckley, Mr. Charles Cheney Hyde, Mr. Fred K. Nielsen, and Mr. Pitman B. Potter.

Dr. JAMES BROWN SCOTT. I second the nominations.

President HUGHES. I understand that the election of this committee must be by ballot. It is fitting, if so desired, that the Secretary be directed to cast the ballot.

Are there any other nominations?

(It was moved and seconded that the nominations be closed and that the Secretary cast the ballot for the parties named. The motion was put and carried and the Secretary announced that he had cast the ballot accordingly.)

Mr. BUTLER. I make the usual motion that in case any member now elected to the Nominating Committee be unable to act, the other members of the Committee are empowered to fill the vacancy.

The motion was duly seconded, put and carried.

President HUGHES. Before we adjourn I wish to express on your behalf our gratitude to Mr. Justice Russell for his very interesting and illuminating address on this important subject, and to express the hope that he will be able to remain with us during the sessions of the Society. I think we all appreciate the trouble he has taken to come here and give us the advantage of his views, and when I say "his views" I refer to one whom you all recognize as an eminent authority upon the question of Canadian relations.

A motion to adjourn is now in order.

(It was duly moved and seconded and carried that the meeting do adjourn. Whereupon, at 10.25 p. m., the meeting adjourned.)

SECOND SESSION

Friday, April 27, 1928, at 10 o'clock a. m.

Mr. President Hon. CHARLES EVANS HUGHES, took the chair.

President HUGHES. You will observe from the program that we have one subject for this session and one paper on that subject. The intention of the Program Committee is that there should be a full opportunity for a free discussion of the subject that is presented.

Our meetings would be of slight assistance if they were to consist simply of the reading of papers, however important they might be. This gathering, happily, has many in it who have given expert attention to the subjects that we take up, and I trust that we shall have a very interesting and free discussion of the topic at the close of the reading of the address.

I take pleasure in introducing Mr. Clement L. Bouvé, who will speak on "Nationality."

SOME SUGGESTIONS CONCERNING THE TERMINATION OF DUAL NATIONALITY AT BIRTH

BY CLEMENT L. BOUVÉ

American Agent, General Claims Commission, United States and Mexico

I had intended, on undertaking to prepare a paper on the subject of nationality, to touch upon the three phases in connection with which conflicts, due not only to differences in the municipal law of various states but to divergent conceptions of the requirements of a national policy, so constantly arise. Specifically, I had in mind dual nationality, expatriation, and the nationality of married women. But it did not take long to convince me that not even a single aspect of so very complicated a subject would lend itself to adequate treatment in the course of a presentation made with a due observance of those limitations in point of time which the dictates, not only of reason, but of mercy, may be conceived to impose. I shall, therefore, limit myself to observations bearing on the subject of dual nationality at birth which point toward the termination of a condition at once in theory untenable, and, in practice, a source provocative of international friction.

The suggestions put forward here with respect to dual nationality are predicated upon the following conceptions:

(1) That the difficulties arising from that particular conflict of nationality known as dual nationality at birth originate only indirectly from the fact of dual nationality thus conferred and acquired, and directly from the claim of allegiance based upon the dual status, which arises in the great majority of cases when the subject of the status reaches the age of eighteen—an age when, under the common practice of nations, he is deemed capable of per-

forming some of the special duties of active, permanent allegiance, notably military service.

(2) That dual nationality at birth, although an anomaly when viewed from the standpoint of the generally accepted principle that the duties of protection and allegiance are inseparable and correlative, and that hence every man should have but one nationality, exists not only as a fact but as a recognized status under the law of nations; and will continue to exist as such as long as some states confer nationality *jure soli* and others *jure sanguinis*, and many by the application of both principles, and as long as citizens and subjects of one state reside and are born in the jurisdiction of another.

(3) That the duties of active and permanent allegiance which every state is entitled to receive from the individual born a national under its laws cannot be adequately performed unless the national makes the territory of the state of which he is a citizen or subject his permanent abode, as distinguished from a place of temporary sojourn.

(4) That the individual born into the nationality of a state either *jure soli* or *jure sanguinis* not only has imposed upon him the duty but acquires the right to tender that state his active allegiance as soon as he is in a position mentally and physically to perform the duties incident thereto; hence, that the individual who by birth acquires a dual nationality has the right to elect to which of the two states in question he shall tender that allegiance.

(5) Finally, that suggestions made in the interests of an alleviation of the difficult situation which confronts the various states in connection with the question of dual nationality should, for the moment, be presented, not with a view to the elimination of dual nationality as an existing condition, an undertaking altogether impracticable in view of the differences in established legal systems, but with a view to terminating its effects in the individual instance under such conditions as might tend adequately to meet the just demands of sovereignty on the one hand, and the rights of the individual, on the other.

That the difficulties with respect to the subject of nationality which remain to be ironed out are recognized and deplored as such by eminent authorities is well known. As Oppenheim states, the very fact of the existence of individuals destitute of nationality is a blemish in municipal as well as international law.[1] Dual nationality comes properly within the scope of this criticism.

After announcing as "the two fundamental principles in the subject-matter of nationality" the doctrine that "every individual should have a nationality" and that "no person can be a member of two nations at one and the same time." Fauchille laments the fact that though these principles are "rigorously sound" in theory, they are far from it in practice."[2] Numerous other authorities might be cited to the same general effect.

[1] International Law, 3d ed., Vol. I, p. 485.

[2] Traité de droit international public, 1922. Vol. I, Part I, p. 844.

The *rapporteur*, Mr. Rundstein in the report of the subcommittee of the League of Nations on the subject of the conflict of nationality laws, after referring to the hope expressed by Weiss and Oppenheim that these conflicts might be solved by establishing a uniform law embodied in an international convention, or by formulating an international convention for the states to revise their internal laws on nationality on a common basis which would serve as a model for the drafting of such laws, states that in order to reach this point "it will be necessary to proceed by stages, for a universal regulation touching upon the substance of the matter would not seem to be compatible with the legal situation at the present day; it would surely be unfortunate if, by attempting tasks which for the moment are beyond us, we were to fail to achieve results which, although modest, would be of great value and, last but not least, practicable." [3]

After quoting from the report of Mr. Rundstein, Mr. Flournoy, in one of his admirable and instructive articles on citizenship entitled "Suggestions Concerning the International Code of the Law of Nationality," counters with the following comment:

> If anything of real value is to be accomplished, however, it will be necessary to approach the subject in a temper more aggressive and more constructive than that exhibited by the League of Nations Committee. Mere statements of the few points as to which general agreement now exists and attempts to remove minor conflicts should not be accepted as sufficient. An effort should be made to settle the major problems, particularly the question of the right of expatriation and the question of the prevention or termination of dual nationality arising out of conflicting claims based upon *jus soli* and *jus sanguinis*.[4]

It is in full accord with the spirit of Mr. Flournoy's observation that the views herein expressed are submitted to your consideration. A trail blazed with a faltering hand does not lead far on the road to progress. If we feel that the difficulties arising from conflicts of nationality should be discussed timidly and in whispers, it would be better not to discuss them at all. Suggestions which, it is hoped, may tend toward an alleviation of these difficulties should be put forward, not in a spirit apprehensive of just and well-considered criticism, but rather with the object of courting it. I shall, therefore, feel nothing but gratification if, should the ideas presented here be shown to be impracticable, inadequate or unsound, further light shall, in the process of demonstrating these deficiencies, be shed upon the path.

It is elementary international law that a state has the right to prescribe the conditions under which an individual is born into its nationality. It is equally well recognized in the law of nations that individuals are born into the nationality of a state by virtue of *jus soli* or *jus sanguinis*, or a combina-

[3] Publications of the League of Nations, 1926, V, Legal, V, 1. Committee of Experts for the Progressive Codification of International Law: Report on Nationality.

[4] Yale Law Journal, Vol. XXXV, No. 8, June 1926, p. 955.

tion of both. Under these conditions one state cannot take the ground that an individual in a given case is not born into the nationality of another, if born within the jurisdiction of that state where *jus soli* obtains, or if born the child of a national of a state where the *jus sanguinis* confers nationality at birth. Particularly is this the case where, for instance, both states make the acquisition of nationality at birth depend upon *jus sanguinis:* as where the child of a parent of a *jus sanguinis* state is born in the territory of another *jus sanguinis* state. No conflict in such a case could arise, of course, if the state of birth is exclusively a *jus sanguinis* state. But there are states where the *jus sanguinis* is accepted as the principal basis of the acquisition of nationality at birth, but which, for perfectly justifiable reasons, based on the wholly sound principle that national allegiance is the normal price of national protection, apply the *jus soli* in a secondary sense and to a modified extent when an individual is born within the national jurisdiction. So, also, where the *jus soli* is the nationality principle adopted by two given states. Neither can be heard to deny that birth within the territory of the other vests the individual at birth with the nationality of that other state.

It is where the child of a parent of a *jus sanguinis* state is born in a *jus soli* state that the typical case of dual nationality arises. The *jus soli* state cannot deny that the child is vested at birth with the nationality of his father's state, *jure sanguinis*, for to do so would be to deny the principle that a state is entitled to determine for itself what qualifications justify the conferring of its nationality upon the individual at birth. But no state is obliged to extend this recognition to the exclusion of the application of its own law of nationality when by virtue of birth within its dominion the child in question acquires its nationality. Conversely the *jus sanguinis* state must recognize that, one of the recognized qualifications for nationality at birth being the presence at birth of a person within the jurisdiction of another state, the child whose nationality it claims by *jus sanguinis* is a national at birth of the *jus soli* state; and it must recognize the fact that it cannot insist upon the *jus sanguinis* principle being given the preference for the further reason that the child in question is within the jurisdiction of the *jus soli* state. Such insistence would be an attempt to procure the enforcement of its own municipal law within a territory over which the laws of the state of birth are exclusive and supreme.

It would seem that as long as international law recognizes that each state is free to apply the principle of *jus soli*, or *jus sanguinis*, or a combination of the two principles in connection with the investiture of the individual with nationality in the given case, dual nationality at birth is a situation which must continue to exist.

It would, therefore, appear that alleviation of the difficulties incident to the condition would be extremely difficult of accomplishment through suggestions having for their object the repudiation of a status generally recognized in international law and which exists by virtue of the difference be-

tween the established legal systems of some eighty-seven states. Rather is it apparent that the remedy lies in suggestions looking toward forbearance on the part of states from exacting, in the case of a resident minor born into a dual nationality, the performance of the duties of active allegiance until he shall decide for himself which of his two nationalities he wishes to retain, and shall have been afforded the opportunity to confirm the good faith of his choice by placing himself in a position where he can perform the duties of active allegiance due the state of his election. An agreement to this general effect involving certain conditions which will be submitted to your consideration in the course of this address, would bring about not only a termination of the condition of dual nationality in a given instance, but would avoid difficulties which at the present time emanate from that status as the direct result of the claim of allegiance put forward by states within the jurisdiction of which persons born subject to that status happen to reside, or even happen temporarily to be. The suggestions in question are predicated upon the following considerations:

Historically, nationality arose out of allegiance.[5] Allegiance is primarily the *raison d'être* of nationality, although, in the normal course, it has come to be regarded as an effect rather than a cause. It follows that children are vested with nationality at birth in the just expectation that their active allegiance will be tendered the nationalizing state. The child is vested with nationality at birth under the *jus sanguinis*, on the assumption that the father is in a position to perform the duties of allegiance and will perform them—will, if he happens to be abroad at the time of the child's birth, return if necessary to perform those duties; and on return will bring the child with him, so that he too, on reaching the age of allegiance, will follow suit. The child is vested with nationality at birth under the *jus soli*, on the assumption, that being born within the jurisdiction of the nationalizing state, he will in the normal course remain there to perform such duties. The true basis, then, of the claim of nationality by a state is the performance by the citizen or subject of the duties of active allegiance.

In the face of such a viewpoint dual nationality, as already stated, is an anomaly, but is, nevertheless, a condition of general recognition in international law. The *jus soli* state must therefore recognize the existence of a valid claim by a *jus sanguinis* state to the nationality of a child born on the former's territory, even though, as long as the child remains in the jurisdiction of his birth, the claim of the *jus sanguinis* state is not enforceable. The claim of the *jus sanguinis* state that its nationality has been conferred upon the child carries with it the necessary implication of an existing allegiance, dormant, it is true, but still a valid claim, of merit equal (except with respect to present enforcement) to that of the state in which the individual is born and resides. The obligation which rests upon the *jus soli* state, as an international person, to recognize the doctrinal validity of this claim should, at

[5] Westlake, 1910 ed., Part I, p. 220.

least as a matter of logic based upon the acceptance by all states of the existence of dual nationality as a fact, preclude the state of residence from preventing a change of domicile by the individual in question, assuming that upon reaching the age of active allegiance, it should be his desire to place himself in the jurisdiction of the *jus sanguinis* state in order to enter upon the performance of his obligations under the nationality conferred upon him *jure sanguinis*.[6]

If a state, by virtue of the recognition by international law of a condition of dual nationality resulting from the birth in a *jus soli* state of the child of a father of a *jus sanguinis* state, is precluded from preventing such a child from retaining the nationality of his father, there would seem to be some ground for the assertion, so often made by our Secretaries of State, that the right of a child born into dual nationality to elect its nationality on coming of age is a right which exists under the law of nations.

It is assumed that the right of election shall be exercised only in contemplation of entering upon the duties of active allegiance within a reasonable time. Aside from very exceptional cases, no one can be said to contemplate the performance of those duties and at the same time maintain his permanent residence in a foreign state. These duties exist, and are capable of performance, in time of peace as well as in time of war by the submission of both person and property to the jurisdiction of the state which is the subject of election. One must, therefore, conclude that the foreign-born child should follow up his election by taking up his residence in the country of his choice. Under our law of March 2, 1907, foreign-born children of American citizens are considered competent to elect at the age of eighteen, the usual age of compulsory military service; *i.e.*, are considered to be competent to enter upon the performance of at least one important phase of the duties of active allegiance. It does not seem, therefore, inappropriate to designate this age as the age of allegiance.

But the question at once arises: Having reached the age of allegiance, and being a resident of the country under the laws of which he is a national, why should he not be under the obligation of at once entering upon those duties like any other national? The answer would seem to be the right of election. For when dual nationality vests at birth, the nationality of both governments is impressed with equal force upon the child born into the dual status. He is born into a double allegiance of equal political import before the law of nations. His obligation as a subject or citizen is and must be, from the standpoint of legal doctrine, no greater to the one government than to the other. To deny this would be to deny the principle of the equality of sovereignty. He cannot perform the duties of active permanent allegiance with respect to both; consequently cannot remain in a state of permanent

[6] "In a broad sense," says Professor Hyde, "international law limits the right of a state to impress its national character upon an individual, or to prevent that character from being lost or transferred." (Hyde, International Law, etc., Vol. I, p. 611).

allegiance with respect to both. International law, like municipal law, does not demand the impossible. It does demand, however, that as between a national and his state there exists the obligation of protection, on the one hand, and the duty of allegiance on the other. It follows that as a matter of sound doctrine, at least, the minor who is born into dual nationality, and who reaches what I may term the age of allegiance, not only should, but must elect the state with respect to which the duties of such allegiance are to be performed by him. Theoretically, then, and as a matter of sound and logical doctrine, the right of election should exist under international law. The necessity for conferring it has been urged by publicists of note. It has impliedly, if not directly, been admitted by many states in the form of treaty stipulations or legislative enactment.

Fauchille's views on the point are thus set out:

> In every case where the law vests the children of aliens with the nationality of the country where they are born, there must be recognized to exist in them the right of electing at their majority the nationality of their parents.
>
> Reciprocally, children born abroad must be able, on reaching their majority, to elect the nationality of the country of their birth when the law of that country confers it upon them, and thus divest themselves of the nationality of their parents.[7]

Mr. Flournoy, in his capacity as Reporter on Nationality for the Research in International Law conducted under the auspices of the Harvard Law School, states that Great Britain and various of the dominions and colonies of the British Empire are the only countries whose nationality laws contain an unqualified provision allowing persons born with dual nationality to elect the nationality which they will follow. However, an examination of the nationality laws of some fifty states shows that these governments afford by their municipal law an opportunity to persons designated and under conditions assigned, to "opt" in favor of the nationality of the state in question. The basic conception of a right or privilege of election is maintained throughout, although with reference more often than not to an "election" or "option" the purpose of which is to change a status which may fail to fulfil the requirements of the local law as to the acquisition of nationality at birth to one with respect to which those defects are remedied. The fact that so many states appear to recognize the obligation to afford the individual the opportunity would seem to justify the hope that the objection to the adoption of the principle as a rule of international law whereby the effects of dual nationality at birth may be terminated may not prove by any means insurmountable.

The existence of the right of election does not involve a change of allegiance in the sense of the surrender of one old allegiance and the adoption of a new one. Under the peculiar condition of the case, the minor is for the

[7] Fauchille, *op. cit.*, p. 845.

first time confronted with the question of on which state to bestow an active allegiance which, by virtue of his minority, has hitherto been bestowed upon neither of the states involved. For the state of residence to refuse to give weight to the expressed option would be to refuse recognition of the condition of dual nationality.

But, as already stated, the election should be made in contemplation of the assumption of the duties of allegiance to the country of the elector's choice. It must be followed up by subjecting himself to the call of those duties. This can be accomplished only by a transfer of his residence. A point of time must be set beyond which the minor, now having arrived at the age of active allegiance, should not be allowed to enjoy the protection of the state of his birth without being called upon to perform the duties of allegiance. That point of time should, it is submitted, be the date of his majority, in deference to the generally recognized necessity of close contact between a minor and his family, with its resultant benefits of parental influence and counsel. It is felt that, before the arrival of this date, it would not be just to insist that the individual establish his own residence in the country of his choice in fulfilment of his intention (of which his election is a public avowal) to place himself in a situation where he can perform the active duties of a permanent allegiance with respect to that state.

Based upon the foregoing considerations, the following formula is offered as a suggestion, which, it will be noted, is so framed as to emphasize the main object to be attained, *i.e.*, the termination of the status of dual nationality under the conditions therein set out.

A. A child who at birth acquires the nationality of two states, either *jure sanguinis* or *jure soli*, shall, upon reaching the age of eighteen years, and being a resident of one state, have the right to elect the nationality of either.

B. The status of dual nationality is terminated:

(1) By the election of the nationality of the state of his residence by a minor who, at the age of eighteen, is a resident of a state of which he is born a national *jure soli* or *jure sanguinis*.

(2) By the election by such minor of the nationality of the second state followed by the establishment by him of a residence in such second state by the time he reaches his majority. The mere act of election of the second state does not terminate dual nationality.

(3) By the prolongation of his residence by such minor up to the date of his majority, although he may have declared his election in favor of the second state, or may have failed to declare his election.

(4) By the establishment by the minor of a residence in the second state at or before reaching his majority, although he may have failed to declare his election.

C. Where a minor, resident in a state in which he is a national *jure soli* or *jure sanguinis*, has, at the age of eighteen, elected to retain the nationality of the second state, the state of residence will refrain from demanding of such minor active duties of allegiance during the period extending from the date of election to the date on which, and before the

attainment of his majority, he shall establish his residence in the state of his election.

D. The right of election is suspended when either state of which the minor is born a national is subjected to, or threatened with, a state of war.

The object and effect of paragraph A is to establish a general acceptance of the principle of the right of election. It has already been suggested that, as many states in effect recognize the right of election in their municipal law, it is thought, provided that there exists a real desire on the part of the respective governments to avoid the difficulties arising from dual nationality, that there should be no insuperable obstacle in the way of the acceptance of the right as an international principle.

The termination of the dual status under paragraph B (1) at the very moment of election seems reasonable. For at that point of time election and residence in the state of election coincide. The formula contemplates and is so worded as to attempt to provide for the continuation of residence in that state. The declarant has reached the age at which he is competent not only to elect but to perform the duties of active allegiance. By his physical situation as a resident he is in a condition to perform them. He is receiving the benefit of the protection of the state of residence, and announces his intention to remain there. It seems only logical, then, that he should at once, if required, enter upon those duties of active allegiance which can be required only on the assumption that the individual performing them owes his exclusive and active allegiance to the state. Under these circumstances it would seem that the nationality conferred upon the minor by the second state should properly terminate by the election of the nationality of the state of residence.

The provision B (2) is predicated upon the assumption that the naked fact of election should be held insufficient to sustain either the surrender or retention of nationality. Paragraphs B (3) and (4) are based upon two assumptions: (1) that the continued residence in the state of residence, or the establishment of a residence in the second state, will operate to nullify the force of a mere declaration of election unconfirmed by residence in the country of election; (2) that the establishment of a *bona fide* residence in a state by a national born beyond its borders will cure the effect of a failure to elect. Needless to say, however, since failure to elect would leave such minor saddled with his dual nationality, he would, before the establishment of his residence in the second country, be subject to the performance of such duties of allegiance to the first as its laws might require.

The contents of paragraph C are submitted to your consideration on the assumption that the right of election would be of small avail if, after election and before the minor had arrived at his majority, the state of residence could comport itself with respect to him as if he had elected in its favor, or as if it were not his intention to follow up his election with the establishment at or

before his majority of his residence in the state of his choice. For a state to refrain from imposing upon a minor in a like situation the performance of military duty is by no means a novel conception.[8]

Under an arrangement such as outlined above, we may consider, let us say, the case of the son born in England of an American citizen. Under Section 1993 of the Revised Statutes, the son would be, on the one hand, an American citizen *jure sanguinis*, and a British subject *jure soli*. Upon reaching the age of eighteen he would be free to exercise his right of election. Failure to exercise it, followed by continued residence in England, would constitute a rejection by him of his American citizenship. On the other hand, an election by declaration of American citizenship, followed by a removal from England to the United States at any time prior to the attainment of his majority, would constitute a rejection of his British nationality. A mere announcement of his election of American citizenship would have no effect upon his British nationality unless followed up by his removal to the United States within the three year period; for that election must be assumed to be based upon the desire to perform the active duties of allegiance toward the state of his election. These duties can only be performed by removal to the state of election. Failure to effect this removal, even after an announcement of election of American nationality, must be looked upon as a repudiation of that announcement, and, because of continued residence in England subsequent to the termination of the three year period, as an election of British nationality.

The status of the child in the given case during the period intervening between the announcement of election and the establishment of a permanent residence in the United States prior to the termination of the three year period would remain unchanged, *i.e.*, would remain a status of dual nationality; but the right of election being conceded by the state of birth, it would be no less than appropriate, in fact would seem to be incumbent upon that state to engage not to require of the elector the performance of any of the active duties of permanent allegiance during the period intervening between the election and the date of his departure some time during the three year period.

The system applied to cases of children born in the United States of alien parents under whose law the *jus sanguinis* obtains presents distinct advantages viewed from the policy adopted by this government with respect to the exclusion of aliens suffering from certain disabilities, mental, moral or physical.

[8] As an instance, I call attention to Article III of the convention concluded at Paris July 23, 1879, between France and Switzerland, in order to regulate the situation of the children of Frenchmen who had become naturalized Swiss during the minority of their children. Under Article I such children were given the right to elect, in the course of their twenty-second year, between the two nationalities, French and Swiss. Under Article III "the young people upon whom this right of election has been conferred shall not be forced to undertake military service in France before the end of their twenty-second year."

Consider, as an instance, the case of the child of an Italian father born in the United States. Born here, he returns in early infancy to Italy. The difficulty which confronts this government as a matter of practical experience is that such children, after returning to Italy, remain there for years, often to a point of time postdating their arrival at majority. Citizens of the United States in name only, aliens in fact, in so far as any true sense of allegiance to the United States is concerned, such children can insist on readmission irrespective of the extent to which they may be subject to any of the mental, moral or physical disabilities which, if aliens in law, would bar their admission under the Immigration Acts.

Assuming, for the sake of argument, that in every case the American born child of Italian parents who in infancy has returned to and has taken up his residence in Italy would elect to retain his American citizenship, and would return to this country before reaching his majority, the provision as to election would prove of substantial benefit to the United States; for at the age of twenty-one a man is at least measurably less likely to have become afflicted with mental, moral or physical disabilities than at a later period of his life. And in this connection it may be surmised with a certain amount of justification, that of those who at eighteen would elect to return to this country, the majority would return before the expiration of the three years following their reaching the age of allegiance.

Upon reaching the age of eighteen, should such child elect to retain his Italian nationality, he would at once put off his garment of dual nationality, and the United States would have no further interest in him as a national. If he should elect to retain his American nationality, while the mere fact of election would not divest him of his dual nationality pending that portion of the three year period during which he would remain in Italy, and consequently the interest in him of this government would *pro tanto* remain fixed, the vexatious question of his subjection to the duties incident to Italian military service would be avoided. If, following up his election of American nationality, he should within the three year period return to the United States, he would be welcome as a citizen of this country; while, on the other hand, if he sought to return after the termination of that period, he would seek admission as an alien, and would be admitted or excluded, in accordance with the provisions of the Immigration Act.

It may be suggested that the requirement that in order to retain his American nationality the child born in England shall return to the United States within three years after his election overlooks the fact that in some cases the duties of allegiance can be adequately met by his remaining abroad and devoting himself to the furtherance of American commercial interests there in a manner more effective than could be accomplished were he to return to the United States. To this objection there is to be found, it seems to me, adequate reply. Whatever merit there may be in the exceptional case, the situation is anomalous from the standpoint of permanent protection

and permanent allegiance; and an agreement on such a vexed question as this should be reached with a view to meeting general and not exceptional cases.

Mr. Flournoy, after suggesting in his article on a code on the law of nationality, from which I have already quoted, the rule that a person born into dual nationality, if domiciled in either country when he reaches the age of twenty-two, shall thereafter be regarded as having lost the nationality of the other, remarks—

> It will doubtless be objected that the proposed rule would work a hardship in some cases, but it should be realized that no effective rule for terminating dual nationality can be devised which will not cause inconvenience to the individuals affected.[9]

Assuming that the considerations which justify the declaration of election at the age of eighteen are, generally speaking, sound, it may be further assumed that the young man of eighteen has not, at that age, acquired, or is not, even then, in a fair way to acquire the qualifications of those comparatively few persons whose presence abroad may be deemed by the United States essential in order to foster commercial or social relations of the two countries. The above remarks would seem to be of general application even when the young man in question shall have arrived at the age of twenty-one, an age less than that attained by the average American at the time he graduates from college. In this connection, it may be further observed that in order for an individual adequately to understand and take part in handling the commercial problems of his country as they arise abroad, he should devote a not inconsiderable preliminary period to their careful consideration and study at short range at home. The necessity for the presence abroad of the highest type of American business man is beyond dispute; but his value as an expert on foreign business is fundamentally based on that experience which has made him familiar with the domestic end of foreign trade.

Hitherto the situation has been discussed on the assumption that the child born into dual nationality is a resident of one of the two states of which he is born a national, and the termination of dual nationality has been predicated upon the abandonment of residence in the one country followed by its establishment in the other. But the case may and frequently does arise where residence in a third country comes into the picture. Mr. Flournoy has suggested that a person born into dual nationality who, upon reaching the age of twenty-two, is residing in a third state shall thereafter be regarded as the national of the country in which he was last domiciled.[10] While this rule, from certain aspects, doubtless has its advantages, it might, it seems to me, open the door to the objection that, just as it would seem improper to adopt a principle under which a state is bound to consider as its national one who, with all deliberation, has performed every act, short of

[9] Yale Law Journal, Vol. XXXV, No. 8, June 1926, p. 950.
[10] Yale Law Journal, June, 1926, p. 950.

naturalization in a foreign state, looking toward expatriation, it would appear equally inappropriate to provide that, under these conditions, the other state is bound to lose its hold of allegiance upon one of its nationals.

Let us suppose that a minor, born in Great Britain of an American father, after election of American nationality and before reaching his majority, leaves his residence in England and establishes it in a third state. It is conceivable that Great Britain might not care to consider as her subject an individual who by election had announced his preference for another nationality and had expressed his unwillingness to render the duties of allegiance to the state in which he was born by leaving the country and establishing his domicile in a third state. If I understand the rule, it embodies the suggestion that, under the conditions contemplated, Great Britain would be bound to regard such an individual as a British subject, even against the desire of that government. In these circumstances it might with reason be urged that states would not feel inclined to accept the principle that a state is not free to accept the voluntary expatriation of one of its citizens or subjects.

Again: Certain of the South and Central American countries have a peculiar attraction for the nationals of South Western Europe, such as, for instance, the Italians. An Italian domiciled in the United States decides to remove to Brazil. He has one or more young children born in the United States and hence born into American citizenship under the Constitution. They are likewise born into Italian citizenship *jure sanguinis*. They are taken in early infancy to Brazil, and remain there until they reach their majority, or, under the rule suggested, the age of twenty-two. Under that rule they must be regarded, as the result of the mere passage of time, as having the nationality of the country in which they were last domiciled, which, in the instance given, is the United States. Under the rule such an individual could return at any time after twenty-two to the United States and gain admission even though suffering from any of the disabilities which would bar him if he applied as an alien. It must be observed, however, that in the great majority of cases Italy would be the country in which such children would be "last domiciled."

While the rule might, therefore, and doubtless would, in many instances, work out to the advantage of the United States, it might be open to the argument that, inasmuch as the change of nationality therein contemplated is urged without regard to whether or not the individual in question declared his right of election, it might, in the case of an American-born child, operate to deprive him, without his concurrence and conceivably against his will, of his citizenship acquired under the Constitution.

Aside, however, from the constitutional point, it would seem that the main objection which might be urged against the rule is that it does not contemplate giving any effect to the exercise of the right of election by declaration. If we concede, as we must, the existence of the right in one

born into dual nationality to declare his election, that right must be held to follow him wherever he may be. And it seems that when the minor is a resident of a third country, the exercise of the right coupled with residence beyond the age of majority, must be deemed to result in effects which cannot be accorded the naked declaration of election when the elector is a resident of one of the states into the nationality of which he was born.

For while the election to surrender the nationality of the state, coupled with a withdrawal of residence from that state at or before reaching the age of majority, would seem ample to constitute a surrender of the nationality of the state of residence; and while as between the two nationalizing states the establishment of residence in the state the nationality of which is elected is considered, under the view which I have ventured to submit, essential to effect a retention of the nationality of that state, it is not so clear that election alone should be insufficient to constitute a retention of the nationality of either nationalizing state when the elector, at the time of reaching his majority, is a resident of a third state. That third state has the right in the interests of internal administration to assume that, having declared his election of the nationality of either nationalizing state, the elector, on reaching his majority, be recognized as a national thereof by the authorities of the third state. It must not be forgotten in this connection that states have the right to determine the conditions under which aliens shall reside within their territory; that they can exclude them if they desire, or expel them under the provisions of the local law unless expulsion is effected as a purely arbitrary act. Deportation is a necessary incident of the right to exclude or expel, and the power to deport is ineffective in the absence of a destination to which the objectionable alien may with propriety be deported. Where election has been proclaimed, the state the nationality of which has been elected would, it is thought, be the proper destination.

In view of these considerations, I venture to emphasize that, while election loses its force, and justly, when repudiated by continued residence after majority in the state the nationality of which the election, when made, purports to reject, decisive weight should, it would seem, be attributed to election when it does not exist in conjunction with residence in the territory of either state under the law of which the elector is nationalized at birth. The fact of election alone should, therefore, terminate the status of dual nationality at birth when the elector continues to reside in the third state after reaching his majority.

In the absence of election by declaration it is not clear to me how dual nationality can terminate by the mere fact of continued residence in a third state. The fact that a minor, born into dual nationality and a resident of a third state, shall have reached his majority without announcing his election would seem to leave his double nationality unaltered. It is true that, born into two nationalities, he has refused the opportunity to elect the nationality of either nationalizing state and has in effect refused his active allegiance to

both at a time when he was competent to tender it. Both states would seem, therefore, as equally justified in refusing to accord him protection while in the jurisdiction of the third state, as they are equally justified in extending it.[11]

But to maintain that failure to elect, coupled with residence in a third state after majority, should terminate dual nationality in favor of the state in which the individual was last domiciled, would be to impose upon that state the retention of an unworthy citizen, and upon the other the loss of a subject, undesirable though he might be considered to be.[12] To provide that such failure to elect, coupled with such continued residence, should terminate the nationality of the individual with respect to both states would result investing the individual with statelessness, that status abhorrent to every conception of sovereignty as well as of citizenship.[13] As between the two evils, statelessness, and the continuation after majority of the condition of dual nationality, there is no question in my mind that the latter is to be preferred. The suggestion that the condition of statelessness is the logical result of neglect on the part of the individual, and can be cured by his naturalization in the third state of residence, does not meet the situation, for he may not have those qualifications which entitle him to naturalization under its laws.

Considering generally in this connection the interests of the third state, a contemplation of which cannot be avoided in the attempt to solve this vexing problem, and especially the question of deportation, it is believed that in the absence of election deportation could be properly effected to a port in either of the two nationalizing states, with a preference, perhaps, in favor of the state where the individual was last domiciled. The fact that the obligation to receive him may be an unwelcome one to the state to which he is deported would seem to be a condition from which it is impossible to escape; for a refusal to accept him would manifest a willingness, unwarrantable from every standpoint, to attempt to force the acceptance by the third state of the continued presence within its borders of an undesirable alien. But it is a difficulty solely attributable to the legal system prevalent in either nationalizing state and for which such state alone is responsible.

Inasmuch as a study of the position occupied by an individual born into dual nationality resident in a third state, leads me to conclude that (aside from the operation of municipal "expatriation acts") that condition can

[11] See Hall, Foreign Jurisdiction of the British Crown, p. 140.

[12] In third states the right to him of each country is equal to that of the other. There is no such reason on either hand for yielding as proffers itself when a claim based upon origin is met by a like claim strengthened by the presence of the individual on the territory of one of the claiments. (Hall, Foreign Jurisdiction of the British Crown, p. 140).

[13] "International law should not admit the possibility of persons without a country—without nationality. By virtue of the very fact that he is a member of society a man must have a country just as he must have a family. It is to the interest of civilized states that there exist no one without a country—no one designated by the term 'heimathlos'. *Heimathlosat* constitutes a danger to society." (Fauchille, *op. cit.*, p. 843). And see passage from Oppenheim already cited.

terminate, with respect to him, only by his election of one of the two states into the nationality of which he is born, the following formula framed with specific reference to this particular situation, is submitted for your consideration:

A. A child who at birth acquires the nationality of two states, either *jure sanguinis* or *jure soli* shall, upon reaching the age of eighteen years, and being a resident of a third state, have the right to elect the nationality of either state into the nationality of which he is born.

B. *Dual nationality is terminated*

When, after electing the nationality of one of the states into the nationality of which he was born, a minor residing in a third state shall have reached his majority.

THE QUESTION OF AUTHORITY UNDER THE LAWS OF THE UNITED STATES

The suggestion may be made that an agreement based upon the formulas put forward here is prohibited by the Fifth and Fourteenth Amendments of the Constitution.

It is true that, after quoting Marshall's well-known statement in Osborn *v.* The Bank,[14] to the effect that the Constitution when vesting in Congress the power to naturalize by legislative act does not authorize Congress to enlarge or abridge the rights conferred by naturalization. Mr. Justice Gray, speaking for the majority in the Wong Kim Ark decision,[15] points out that "*a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race can affect citizenship acquired as a birthright by virtue of the Constitution itself, without any aid of legislation." And Mr. Justice McKenna, in Mackenzie *v.* Hare,[16] states that for the purposes of the case before the court "it may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."

But there is nothing in the Constitution to indicate that what the Supreme Court has described as the "inestimable heritage of citizenship" is an "inalienable heritage of citizenship." As a government the United States is invested with all the powers of sovereignty,[17] powers which the Supreme Court declared that it "should hesitate long before limiting or embarrassing." [18] Among those powers, as a preëminent attribute of sovereignty, is that of determining the conditions under which citizenship may be retained, as well as conferred. And in this connection it may be suggested that we are not called upon to admit a preferential situation existing in favor of an American citizen born within the limits of the United States as against an American born abroad under Section 1993 of the Revised Statutes, as far as nationality is concerned. Both are born into an equal quality of citizenship under the supreme law of the land, since the Act of Congress is, within its

[14] 9 Wheat. 738, 827. [15] 169 U. S. 649, 703. [16] 239 U. S. 299, 311.
[17] Mackenzie *v.* Hare, *supra*, p. 311. [18] *Ibid.*, p. 311.

field of operation, the supreme law, for no reason other than that it was made in pursuance of the Constitution.

Mr. Flournoy has already observed that the Fourteenth Amendment provides "a rule for determining acquisition of citizenship, and not a rule for determining loss of citizenship." [19]

With reference to objections raised on Constitutional grounds, we may consider just how an agreement for the determination of dual nationality under the terms of the formula herein submitted would affect American citizens.

First, as to those born into American citizenship under the Fourteenth Amendment, who, for the purpose of analysis, may be divided into two classes: those who are residents of this country at the age of eighteen, and those who at that age are residents of the other state into the nationality of which they have been born *jure sanguinis*.

The minor residing here on his eighteenth birthday acquires the right to declare his election at that date, but no duty so to do is imposed upon him. A failure on his part to elect American nationality by declaration has no effect whatever upon his status as an American citizen. His continued residence in this country until reaching his majority serves one purpose only, to wit, to establish in him a single and exclusive American nationality in the eyes of international law and of the state of which he was born a national *jure sanguinis*. Not only, under the formula suggested, is his American nationality left unimpaired, but he is released from all claims based on nationality *jure sanguinis* wherever he may be.

The minor born here who, at the age of eighteen, is a permanent resident of the state into the nationality of which he is born *jure sanguinis* is none the less a citizen of the United States through the fact of such residence or because, when he arrives at the age of eighteen, he fails to elect to retain his American nationality, provided that he does not elect the nationality of the state of which he is such resident. The rights of American citizenship into which he is born under the Fourteenth Amendment can divest only as the result of his deliberate act and choice. They are lost only through his election of the citizenship of the state of residence at eighteen, an election by declaration; or by his deliberate refusal for three years following his arrival at the age of allegiance to place himself in a situation where he can perform the active duties of allegiance to the country of his birth, coupled with a residence as resolutely maintained in the jurisdiction of a foreign state into the nationality of which he was born an election expressed and confirmed not by words alone, but by deeds.

The same reasoning applies to the case of a child born abroad in a *jus soli* state of an American father and who is a permanent resident of such state when he reaches the age of eighteen.

With respect to a minor born into dual nationality and into American

[19] "Suggestions Concerning an International Code on the Law of Nationality," Yale Law Journal, June, 1926, Vol. XXXV, No. 8, pp. 939, 948.

citizenship *jure soli* or *jure sanguinis* who, prior to attaining his majority, is a permanent resident of a third state, the formula presented contemplates the loss of American citizenship only when, having reached his majority, he shall theretofore have declared his election of the nationality of the second state.

It will be observed, then, that in the three types of cases the formula provides that loss of American citizenship shall occur (1) only after the opportunity has been given to elect to retain it, and (2) as the result of the choice voluntarily exercised by the citizen of the nationality of the second state, manifested either by an election by declaration, or by an election by overt act. Further, that American citizenship is not lost by the mere failure of election by declaration even where the minor is permanently residing in the second state of which he was born a national, or when he is a permanent resident of a third state. An arrangement of the nature suggested would not, therefore, appear to violate Mr. Justice McKenna's dictum in the case of MacKenzie *v.* Hare, that "a change of citizenship cannot be arbitrarily imposed, that is, without the concurrence of the citizen." [20] If the loss of American citizenship under such conditions would not occur as the result of an "arbitrary exercise of government," there would seem to be no reason why, as an abstract question of legislative power, Congress should not, unaided by treaty, be considered as authorized to enact legislation to the effect suggested; for I do not believe that, under the circumstances, such action is, to use the words of Mr. Justice Holmes, "forbidden by some invisible radiation" from the Fifth Amendment.[21]

Of the power of the government to enter by treaty into some such arrangement, I am inclined to believe that there exists no real doubt; for, again to borrow the words of that great jurist:

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an Act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.[22]

APPENDIX

Citations Relative to the Right of Option by Individuals

A recent citation is in the Act of December 20, 1923, by France concerning the acquisition of French nationality in Tunis, *Journal Officiel de la Republique Française, December 21, 1923.*

[20] Mackenzie *v.* Hare, *supra*, 239 U. S. 311.

[21] Missouri *v.* Holland, 252 U. S. 416, 434.

[22] Mr. Justice Holmes, in Missouri *v.* Holland, 252 U. S. 416, 433.

This Act is in settlement of the dispute between France and Great Britain resulting in Advisory Opinion No. 4 of the Permanent Court of International Justice, known as "The Tunisian Nationality Decrees."

This case may be found in the *American Journal of International Law, Vol. 17 (1923), p. 23, 298; Vol. 18, (1924), p. 2.*

Treaties Providing for the Right of Option

Consular Convention between France and Spain of January 7, 1862, concerning the civil rights of their respective subjects within the two States, *Archives Dipl., 1863, X, 30; De Clerc, VII.*

Treaty between France and Switzerland of July 23, 1879, *De Martens, N. R. G., 2nd Series, VI, 484.*

Convention between France and Belgium of July 30, 1891, relative to the application of the laws governing the military service in the two countries, *De Martens, N. R. G., 2nd Series, XVIII, 594; XIX, 541.*

It is seen that the Convention of January 7, 1862, between France and Spain is not found in *De Martens* but excerpts from the treaty may be found in *Clunet, 1883, p. 58.*

The treaty between France and Switzerland of July 23, 1879, is also referred to by Clunet a number of times, giving statistics relative to the number of persons who had exercised their right of option within the two countries, *Clunet, 1888, p. 769; 1890, p. 779; 1903, p. 717.*

The only other treaty provisions which were found concerned the familiar right of option of nationals domiciled within ceded territories, treaty of March 24, 1860, between France and Sardinia ceding Savoy and Nice to France, *De Martens, N. R. G., XVI, Part 2, p. 539.*

See also *Clunet, 1875, p. 38; 1876, p. 216.*

Cogordan, in his *La Nationalité, 2nd Ed., p. 359 et sequa,* gives an account of the acts required by the inhabitants of Alsace-Lorraine to retain their French nationality; see also *Clunet, 1875, p. 15; 1898, p. 296.*

The right of option was also granted by the United States in the Treaty of Guadalupe Hidalgo, Art. 8, *Malloy, I, p. 1111,* and in the Gadsden Treaty, Art. 5, *Malloy, I, p. 1123.*

Decisions Concerning the Right of Option

A case in Chile believed to be exactly in point is found in For. Rel. 1907, pp. 124–125.

A series of interesting decisions of the French courts relative to the exercise of the right of option by an individual born in France of a father who was entitled to a *jure sanguinis* nationality through his father, even though such parent was himself born in France, are cited in *Clunet, 1881, p. 364; 1883, p. 56; 1889, p. 646; 1898, p. 372; 1906, p. 1156.*

The most important of these is probably the case of Gustave Black. *Clunet, 1898, p. 372.* (*Cf. Clunet, 1895, p. 111, 1066*) in which the opinions of Renault and Waldeck-Rousseau were requested. (*Clunet, 1895, p. 1067*).

For the situation of the son born in France of a foreign-born father, and of a native mother, see *Clunet, 1897, p. 566.* For the situation of the individual after the period of majority, see *Clunet, 1897, p. 565.* An extensive note touching upon various phases of this subject is found in *Clunet, 1878, p. 622.*

The provisions of the French Civil Code concerning the admission to nationality of children of foreigners, and the right of option, are briefly given in *Clunet, 1905, p. 269.*

International Law Association, Thirty-first Conference, 1922

See "*El Problema de la Doble Nacionalidad*" by J. S. Garcia (Report, p. 293 at p. 300) in R. S. Fraser, "Nationality and the National State" (Report, p. 307 at p. 308).

President HUGHES. The Secretary will make an announcement before the discussion begins.

Secretary GEORGE A. FINCH. I am requested by Mr. Bailey, the Chairman of the Committee on Nominations, to state that the Nominating Committee will meet at 2 Jackson Place after the meeting of the Executive Committee at 4.30 p. m. The members of the Committee who were elected last night in addition to Mr. Bailey are Mr. Hyde, Mr. Hinckley, Mr. Potter and Mr. Nielsen.

I would like also to suggest to members who have not made arrangements for the dinner tomorrow night that they do so as soon as possible. We will have probably a very large attendance at the dinner, and it is going to be quite a task to arrange the tables and have the list printed in time for distribution. The tables will be made up this afternoon and tonight and the seating list will be sent to the printer tonight. We will accept reservations tomorrow to the capacity of this room, but it will not be possible to change the seating assignments after tonight.

President HUGHES. The subject is now open for discussion.

Dr. HENRY B. HAZARD. I think I express the feeling of all here when I voice my own appreciation of the splendid handling of this very difficult subject by Colonel Bouvé. There are one or two points which occur to me. If I correctly understand Colonel Bouvé's formulae, they provide in some of the categories that the nationality of one of the countries may be gotten rid of when the person having the dual nationality reaches the age of eighteen, or at some time between the ages of eighteen and twenty-one. I am wondering whether the judicial expressions on the part of some of our courts might not interpose an obstacle. In *Ex parte* Chin King (35 Fed. 356), decided forty years ago by the United States Circuit Court for Oregon, there is dicta holdings, as to an American-born child, that the father cannot deprive the child of its American citizenship status acquired by birth by any act on the father's part, and that the child himself cannot change his status by his own act until he has reached his majority. Then there is the further dicta in the case of United States *v.* Wong Kim Ark (169 U.S. 649, 704), decided in 1898. In this case the Supreme Court, considering the status of an American-born child, stated that it was at least doubtful whether by any act of his own or of his parents during his minority the child could renounce his American nationality.

There is another point which may have some relation to the matter. The nationality laws of many of the foreign countries differ as to the age at which their own nationality may be acquired through naturalization. One prominent example is the recent French law of August 10, 1927, in which the age is fixed at eighteen. There are just a few countries that make the age requirement as low as that, some seven I believe, and there are countries which make the age limit twenty years. Then there are quite a number, about a dozen, which fix the age at which naturalization may be acquired as

majority without expressing any definite age at which majority is reached. There are another dozen or so which fix the age at twenty-one, and Belgium requires twenty-two in the case of ordinary naturalization and twenty-five for final naturalization. I am not sure that these points would affect vitally Colonel Bouvé's formulae, but I believe they may well be considered.

Mr. ARTHUR K. KUHN. Permit me to express my appreciation of this effort to arrive at a real solution, presented to us today by Mr. Bouvé's excellent paper. I agree that "faint heart ne'er won fair lady," and I believe that the fair lady, *Justicia*, is likewise not to be won by a faint heart. Therefore we may well take in hand advancing one step further than the learned *rapporteur* and the expert committee of the League of Nations were willing to go.

But my thought is—and this criticism is for the benefit simply of stimulating further discussion, I hope,—that under the solution offered by Mr. Bouvé, a declaration in itself is not sufficient to determine nationality or to eliminate dual nationality. It has to be followed by residence in the state. This leaves a situation which is to my mind undesirable, because residence, or, as we term it more technically, domicile, is very often determined by a whole conglomeration of facts constituting the will to elect a certain place as a permanent home. Even a "general abode" is not always an easy thing to determine. I will grant you, sir, that when a person returns to the country of his birth and remains there permanently, going nowhere else and having very few contacts in business or otherwise, the problem is simple. But the example given by Mr. Bouvé of permanent commercial contact with a foreign country is comparatively seldom met with in comparison with the vast number of persons who move their home about between the nations by reason of conditions of labor. Labor is often seasonal, and in those instances it is very difficult to determine just where the residence is. If the immigrant goes back to the country of his birth and stays there permanently and has no further contact, it is simple, but I submit that this is no longer the typical case.

Now in the case where there is movement, where the working people are seeking occupation in different countries, let us say between Italy and the United States when labor conditions are more favorable here, it is sometimes quite difficult to determine just where the residence is. That leaves the status of nationality suspended, very much like Mahomet's tomb was said to be suspended, somewhere between earth and heaven.

Now I have this constructive suggestion to make, if it can be worked out in practice, namely, that the final determination shall be made after the period of necessary residence and not before. If you make provision for a declaration and then say, "Well, we don't know whether this is going to be final; he may live in the country he has selected or he may not," we are going to have a great deal of difficulty and nationality will be difficult of ascertainment. But if you make the final declaration follow after the period of neces-

sary residence, then the government may be able to decide whether he has actually accomplished the necessary residence and the certificate following the declaration will then be a final determination of the status, very much as the naturalization decree today is the final determination of his status. This is a more desirable result, because, as many of you here well know, nationality is not merely a determinant of allegiance but in many of the countries of the world it is a determinant of private legal rights. It does not happen to be the case ordinarily in the United States; but in considering this subject, we must look at it from an international point of view, from the point of view of other states as well as our own. Particularly Italy determines the private rights of its nationals by the Italian law, no matter where domiciled, and many other states to a large extent do the same, and therefore the status of nationality should be fixed and determined by some governmental act in conjunction with expression of will of the party himself, and not left to be determined by a difficult investigation based upon facts as to where the domicile actually is.

Mr. RICHARD W. FLOURNOY. I appreciate the difficulties just advanced by the last speaker, particularly the question of determining the actual residence of the individual when the residence is made a test of election, that is the individual is assumed, according to the proposed formula or part of it, to make the election of the country where he resides. I have been dealing with these cases of dual nationality for a good many years, however, and I think that in a great majority of these cases there is very little difficulty in determining where the individual actually resides at a particular time. The typical case, the case we have to deal with in this country at least, is the case of an individual born here of alien parents, say Italian parents, who is taken back in very early childhood to their country and continues to reside there. Shortly before or after he reaches his majority he is called on to perform military service in the country in which he resides and of which he is a national *jure sanguinis*. Finding it desirable to escape military service, he decides that he will immigrate to the United States and applies for an American passport. In those cases it is a very simple matter to decide, I think, where his residence is. In a few cases the question of the actual residence of the individual when he reaches a particular age, the age, for instance, of twenty-one, if that is taken as the time for the decision, might be difficult to determine, but, as I see it, we have to make a choice between a more or less empty declaration of an individual or the actual facts of the case, to determine his status. I think that the facts of the case, that is particularly his choice of his own home, should determine it rather than a mere declaration. For example, this country would, I am sure, be unwilling to agree to a rule under which individuals born in the United States and brought up here should be able, upon reaching the age of majority, although still continuing to reside here, throw off their American allegiance by going through the mere formality of a declaration. I don't think we could agree to any such thing as that.

It is true that the British have such a law. Their laws are very liberal, and a person born in England of an American father may upon reaching his majority make a declaration that he does not wish to be British and renounce his British allegiance and there is no claim made, as I understand it, for his retaining it. But England is not a country of immigration to the extent to which the United States is, and any rule under which persons born and still living here could cast off their American allegiance would not be agreed to by the United States, I am sure. For that reason I think the facts of the case rather than the mere declaration should determine the allegiance, if possible.

Professor JAMES W. GARNER. I think the obvious criticism that would be made against Colonel Bouvé's notion is that it does not attempt to avoid dual nationality at all, at least during the minority of the child. It simply suggests the means by which dual nationality may be terminated at a certain age. Now I think that if that solution is the best obtainable it is regrettable. I take it that Colonel Bouvé goes on the assumption that an international agreement under which it is possible to prevent the occurrence of dual nationality at the outset is impossible. I don't entirely share the view that such an agreement is impossible. It is of course a matter of mutual concession, give and take, but which I believe is possible. There is, I believe, no decision of the Supreme Court of the United States nor any act of Congress which definitely recognizes the right of a child born in the United States, whether of alien parents or American parents, to elect a foreign nationality even upon the attainment of his majority. Now that may seem curious, but I believe it is a fact. Our law recognizes the right of a child born in the United States to expatriate himself by naturalization abroad or by residence in a foreign country under certain conditions, but it does not definitely recognize the right of a child born in the United States to elect another nationality so long as he remains domiciled in this country.

It has been suggested that the Fourteenth Amendment stands in the way of such recognition. I do not share that doubt. I believe the history of the circumstances under which the Fourteenth Amendment was adopted shows that the intention of the authors of that amendment was to confer a privilege upon persons born in the United States and not to impose upon them a status against their will, at least, not to prevent them from electing a foreign nationality. The United States refuses to recognize this right of election. France recognizes the right of children born of alien parents in France to decline French citizenship, but she refuses to recognize the right of children born of French parents in America, we will say, to decline French nationality. So there you have a conflict of policy, and the status of dual nationality can never be done away with until the *jus soli* states concede that children born of alien parents within their territory shall have the nationality of the parents and the *jure sanguinis* states like France also concede the right of their nationals abroad to decline their nationality. The Nationality Act passed by the French Parliament last August does make some concessions,

but they do not amount to very much. That law states that children born abroad of French parents shall be recognized as citizens *jure soli* of the country in which they are born, but there is a proviso which states that this is recognized only in case the French Government authorizes them to elect such nationality. That means plainly that the consent of the French Government is still necessary to election.

I quite agree with Colonel Bouvé that there ought to be a connection between domicile and nationality, and the right of election should only be recognized in favor of the country in which the person electing is domiciled. In other words, no man should be allowed, while domiciled in one country, to elect the nationality of another country. The Latin American countries I think are more logical than we are in that respect, because they connect intimately the idea of nationality and domicile.

As to the difficulty of the status of dual nationality, it would not be serious if it were not for the fact that the European states which have compulsory military service insist upon claiming military service of male persons born abroad of their nationals. Some have proposed to fix the age of election at twenty and twenty-one and in some cases twenty-two, as Mr. Hazard has pointed out. I believe that is Mr. Flournoy's suggestion. Well, here is what will happen. If you defer the age of election beyond the eighteenth year, which is the age at which military service usually begins in Europe, there will be a period of three or four years when the citizen *jure sanguinis* may be required to perform military service before he has a right to exercise the privilege of election. Now that situation can be avoided by international agreement only, and I may say that France now has treaties with Belgium and Switzerland under which the parties agree that they will not require military service of persons whom they claim as nationals *jure soli* when they are claimed at the same time by the other party as their nationals *jure sanguinis*.

It happens, however, that the parties to these treaties are all countries which have this system of compulsory military service. France does not hesitate to enter into agreements of that sort with such countries. Whether she would be willing to enter into such a treaty with the United States is very doubtful. But there is the solution, the only solution, unless you fix the age of election at eighteen, as Mr. Bouvé suggests. If you do that, the matter of military service will not enter into it, but if you fix it at twenty-two as I believe Mr. Flournoy suggests, you cannot avoid it without some national being liable to military service before he reaches the age of election.

Mr. FLOURNOY. I call attention to two old treaties between Bolivia and European countries. I will read a short excerpt from one of them the treaty of 1910 between Bolivia and Germany on this very point. Article VII is as follows:

> Children born of Germans in Bolivia and children born of Bolivians in Germany shall not be called on for military service previous to

their having reached the age of twenty-one years by virtue of the right of election specified in Article VI, paragraph 2.

The other treaty, that of 1912 with Belgium, contains a similar provision.

Professor Garner mentioned one or two other treaties to which European countries are parties. Since there are already existing a number of treaties with provisions concerning military service in cases of dual nationality, it would seem that it would not be beyond the range of possibility to effect a general international agreement that in case of dual nationality military service should not be required until the individual reached the age when he was capable of making a choice of the nationality which he wishes to retain.

Professor QUINCY WRIGHT. I do not want to speak long, but I merely wish to ask a question of Mr. Flournoy. The emphasis which I understood he laid in his speech was upon the unwillingness for practical reasons of the United States to accept the principle of election for persons still domiciled in the United States. I merely would like to ask, what are the practical interests which would be affected? I can readily see why a country with universal military service might have objections to domiciled persons choosing another nationality, but in the case of the United States, which does not, except in time of war, have universal military service it seems to me that there might be less practical objection than in the case of other countries. I wonder if Mr. Flournoy could address himself to that question of practical interest, irrespective of the present state of our law, which would be affected by recognition of a choice of nationality.

Mr. FLOURNOY. In the first place, I think in an attempt to establish new laws applicable generally in the world concerning nationality, certain principles should, if possible, be observed in all the various provisions, and it seems to me, as a general principle, that an individual should not be free to cast off the nationality of a country while continuing to be domiciled in that country. That is more or less theoretical. As to the practical phase of the question, two points suggest themselves. First, it would be undesirable to have any large number of individuals born in the United States choosing the allegiance of some other country. We have the alien problem already. Some of our cities are largely populated with aliens, and this would serve to increase the number of aliens in the country. I think that would be a bad thing. Then, of course, in time of war, the rule simply would not work. It would be practically impossible to observe such a rule when a country is at war, and it seems undesirable to have one rule concerning nationality for peace and another rule for the time of war.

Mr. HOLLIS R. BAILEY. So far we have been discussing the nationality of only a part, perhaps an important part, but only a part of the nationals of the United States and other countries, namely, men, persons of the male sex. We have in this country and elsewhere a large number of females who are also greatly interested in the question of nationality.

Going back to 1917 when the United States was entering the World War, the Congress passed the Alien Enemy Act, by which the property of an alien was, perhaps not confiscated, but taken into the custody of the Alien Property Custodian, I had a client, a lady born in the United States, who had lived all her life practically in Germany, who had in New York City some thousands of dollars worth of property. The question came up whether the United States Government were going to confiscate that property. It was represented to the Alien Property Custodian that she was an American citizen. On the question of domicile of course she had lived in Germany for thirty years or more and undoubtedly expected to live there all her life. However, her American citizenship was recognized, and she was not classed as an enemy and we got the property for her. As regards her half sister, who was of German birth, her father was a German, we could not work that same thing for her and the property was taken over by the Alien Property Custodian. So you see that when we confine the discussion, as we have done this morning, to the male sex, you are only dealing with a part of the problem.

I agree quite well with what one of our speakers has said, but he made one statement that ordinarily the private rights of people in the United States do not depend upon nationality. Now I happen to be one of the bar examiners in Massachusetts, and we have a law, as they have in all States except one, I think, that a man cannot be a member of the bar unless he is an American citizen, so we have this question of nationality coming up twice a year in Massachusetts and I suppose coming up all over the country, is this person or that person a citizen of the United States? It is quite a difficult question, so that in this matter of confiscation of property of alien enemies in time of war and the rights of persons in the United States, both male and female, to become lawyers, the question of nationality is a little bit broader than we started out with this morning.

Dr. JAMES BROWN SCOTT. We have with us a gentleman who has done us the honor to be present, Mr. Flournoy, who has been for months past working on a difficult project of nationality, upon the subject to which he has devoted the best years of his life, and I would move, if it is proper, that the Chair request Mr. Flournoy to lay before this meeting the project which he has prepared so that it may be taken as the basis of whatever discussion there is in the hope that in the time left to us we may greatly profit and perhaps reach a conclusion.

President HUGHES. I am sure we will be glad to hear from Mr. Flournoy.

Mr. FLOURNOY. It is rather short notice, Mr. President, to make a general statement concerning the work which Dr. Scott referred to. That is, the attempt now being made in this country under the direction of a number of gentlemen who are engaged in teaching international law to prepare the way for the delegates of the United States to the forthcoming conference at The Hague in 1929 on the codification of international law, one of the sub-

jects to be considered by that Conference being the subject of Nationality.

I began this work in January last under the direction of Professor Manley Hudson and the other members of the executive committee that I mentioned. I have had the help of certain gentlemen in the State Department and also of Mr. Hazard of the Department of Labor, who has rendered very great service, and I think we have made some headway.

The first thing we did was to make a collection of the nationality laws of all countries, and that is about complete. We have them in bound volumes with the necessary translations. They require some checking up and correcting, but the collection is practically complete.

The next step was to prepare an analysis upon the three outstanding problems, as I see them, of nationality, that is, the subject which we have just been discussing, dual nationality, the subject of naturalization, with particular regard to the so-called question of the right of expatriation, and the extremely tangled subject of the status of married women. These analyses have been completed, and I have copies of them with me, and will be glad to show them to any of the members.

Dr. SCOTT. Might Mr. Flournoy read the text of his project?

Mr. FLOURNOY. I think that it would take up too much time to attempt to read the whole text. Moreover, this is not final by any means. I have a number of advisers who have ideas of their own and I have no doubt that my suggestions will be very much modified when the advisers get through with them. That is what advisers are for, to give advice concerning changes which seem desirable. I can state very briefly, I think, the suggestions which I have made, subject to change, without reading them. It would take less time perhaps.

First, as to the subject of naturalization and expatriation. Naturally an American organization will take the American view and try to have it agreed to by other countries. I refer particularly to the principles proclaimed by the Congress in 1868, with regard to the inherent human right of a person to change his nationality. Whether we will obtain an agreement to that principle immediately is doubtful. It is to be hoped that sooner or later all countries will come around to that view. It is important to remember that a century ago the other view was prevalent everywhere, so that the fact that the countries are now nearly evenly divided is not discouraging, but rather encouraging, because if so many have changed their views in such a comparatively short period in the life of nations we may hope there will be a complete change within a few years.

The other question, that of the married woman, is, I think, the most difficult of all to solve, especially in view of the fact that the nationality laws of the various countries seem to be in an unsettled state at present because of the changing conditions of woman and the corresponding changes in the laws everywhere. Our own Act of 1922 made a very considerable, if not complete, change in the nationality of married women. I won't go into that be-

cause you are all familiar with it. The laws of several other countries since the World War have been changed considerably in the direction of the freedom of women to choose their own nationality rather than to follow necessarily the nationality of the husband. I suppose we will have to recognize that a change has come in the world with regard to the status and rights of women, and the sensible thing seems to be to bear that in mind and not attempt to go back completely to the old rule.

The suggestion which I have made, in a tentative way, as I say, is that when a married woman marries an alien and takes up her residence, that is, her permanent residence, in his country, she shall follow his nationality and lose her original nationality. Possibly there should be added to that a further condition in the direction of more liberality, that is, that if she makes an affirmative choice to retain her original nationality, she may do so, even though she goes to reside in her alien husband's home country. Personally I think the more reasonable view is that when a woman marries an alien and takes up her residence permanently in his country she should be a national of that country. That seems to be common sense. The argument that in time of war the property of a woman married to an enemy alien will be seized as enemy property does not appeal to me at all, because in time of war you do not have to take the property of anyone unless you want to, and if you take the property of aliens you can make exception in behalf of these women. I will not go into the various minor points that we will attempt to cover, such as the nationality of foundlings, etc. They are comparatively unimportant.

The third important point is the one we have been discussing today, that is, the question of dual nationality. Personally, of course, while I agree with Professor Garner that it would be most desirable to have a general rule under which there could be no dual nationality at birth, I doubt whether it is practicable. In considering any such thing we naturally start with ourselves. With the enormous immigration we have had in the past and the considerable amount that we still have and shall have for years, children born in this country will still be claimed as American citizens. I do not think we can give that up; it is in the Constitution, and it is not an easy thing to change the Constitution, as to at least things in which you might say there is no general interest. Thus we will have the *jus soli* for many years to come. I think a more reasonable rule than the present unrestricted *jus soli* would be a rule that a person born in a country of domiciled aliens would have the nationality of that country, but the law of this country does not seem to be thus restricted.

As to the other question, would we be willing to give up the *jus sanguinis*? We have it, in our own law. Section 1993 of the Revised Statutes provides that a person born abroad of an American father who has resided in this country is born an American citizen. If an American merchant in London or a banker or a missionary in China or any other American residing

abroad has a child born abroad, it would seem abhorrent to such a person that that child should not be born an American citizen. Under our law he is, and I don't think we will give that up. I don't think it would be the general feeling that we should give up that claim. So that, while it is not very desirable perhaps to have dual nationality, I think it is a fact that we have to face. With one family living in the country other than the country of the nationality of the parent it is only natural that the child should be in a peculiar status under the law, and perhaps from one point of view it is reasonable that such child should have the right, upon reaching the age of maturity, to choose for himself between the nationality of his father and that of the country of birth. Our present idea on this subject is this—as I say, all these things are subject to change—that the individual should have the nationality of that one of the two countries claiming his allegiance in which he has his residence at the time of reaching the age of twenty-one or twenty-two years. I think perhaps twenty-two years would be more reasonable so that the individual would have one year after reaching what is ordinarily regarded as the age of maturity within which to make his choice.

The other provision was that a person born with dual nationality, if living in a third country at the time of reaching the age of twenty-two years, should have the nationality of that one of the two countries claiming his allegiance in which he last had his residence. That proposal was criticized by Colonel Bouvé to some extent this morning, and I think that perhaps some of the points which he made were well taken. I think perhaps, with regard to such an individual, we might add to that rule that the individual, while normally he would follow the nationality of the country in which he last had his residence, might choose the other by an affirmative act. I should see no objection to such an amendment to the proposed rule.

Now those are the three principal difficulties which we are endeavoring to solve in this proposed code, and any suggestions that members of this Society may furnish for the solving of these really very difficult problems will be appreciated by all of us who are engaged in this attempt at a preliminary codification.

Professor WRIGHT. I was very much interested in this exposition of the plan which the committee is working on. Mr. Flournoy referred to the Act of 1868 which specifies the inherent human right to change one's nationality. I should think that might also be interpreted as meaning the inherent human right to choose a nationality when you have a choice. It seems to me both in the matter of married women and dual nationality the principle underlying the suggestion made by Mr. Flournoy would be rather the inherent right of the country to claim the nationality of persons domiciled within it. It may be that that is a more reasonable principle than the principle of the inherent human right to choose nationality, but it strikes me as being a different principle.

I raised a question previously with Mr. Flournoy as to the practical

reason, if there be any, for abandoning what seems to have been the American principle stated by Congress in 1868. Mr. Flournoy suggested two reasons. One of them was that there were so many persons who would have a choice of nationality in the United States that they might all choose a foreign nationality and thus increase the alien population in the United States to a great extent. I would like to ask this question: Do you think the persons having a choice would so much prefer some nationality other than American that they would choose it? If they continued to live here and had to choose, it would seem to me that they would prefer to be American citizens. I do not think that *a priori* we can infer that all these persons would choose the foreign nationality. Is it so unfortunate to be American citizens that they would do that?

The other objection Mr. Flournoy made was that it would be unfortunate to have a different law applicable in time of war and in time of peace. During the last war we restricted emigration, and made various changes in the law of naturalization. I think it is inevitable that a state of war with a draft will make a difference, and I do not see why the probability that you would have to eliminate choice of nationality during war is necessarily against accepting the general principle.

Professor MANLEY O. HUDSON. I think the discussion this morning has shown, and Mr. Flournoy has rather emphasized, the importance of our knowing what is the extent of treaty-making power of the United States Government, with respect to the question of nationality. It seems to me that this Society would render a service if it would assist in the clarification of American opinion concerning the constitutional limitations of our treaty-making power. We ought to think of our treaty-making power in terms of the current world affairs, and some departures in treaty-making may become desirable. But we always encounter opinion of that to the effect that the Government of the United States is limited by the Constitution as to the possibility of treaties which it may enter into. I think it is a subject that we ought to explore at some future time and continue to explore for several years to come. Just how far do our Constitutional provisions, concerning nationality, for example, limit the Federal Government in its exercise of the treaty-making power?

I was very much interested in a remark of our President last night with respect to the private international law convention which was adopted at Havana. I thought I understood the President to say—I rather hope I misunderstood him—that there was some constitutional difficulty in the way of our entering into a treaty concerning private international law. I hesitate to believe that the Government of the United States is debarred from entering into treaties concerning matters which have been the subject of treaties for many decades past, and since the decision of Missouri *v.* Holland the power of the Federal Government ought to be very clear. But Mr. Flournoy has so often referred to the Constitution that it seems to me he has

raised the whole problem of constitutional limitation which this Society ought to explore, and I hope that in the future we can assist in the clarification of professional opinion in this country which is at the moment somewhat divided.

President HUGHES. I suppose that the President can rise to a question of personal privilege. In what I said last night with respect to the code of what is called private international law, which was a subject of consideration at the Havana Conference, I had no idea of dealing merely with technical constitutional questions. From such experience as I have had as a member of the Supreme Court, I have acquired a great deal of diffidence in speaking upon questions which have not been authoritatively examined and expounded by the court.

To my mind there is nothing more interesting than an examination of the extent of the treaty-making power. It has been discussed in a very illuminating way by the present Chief Justice of the United States, before he became Chief Justice, and it has been the subject of important decisions such as that in Missouri *v.* Holland, to which Professor Hudson has referred. Those who are liberal in their interpretation of the scope of the treaty-making power I think have the conception of the United States as a sovereign power having foreign relations and as being equipped with authority under the Constitution to enter into agreements with other nations in matters that relate to external affairs or the relations between the United States and other nations.

It is, however, quite a different matter to suppose that the treaty-making power would extend to a subject which is exclusively internal, as, for example, with respect to the host of questions which we consider as within the field of legislation of a State of the Union. I am not now speaking of the interests of foreigners or of any question which would concern the Department of State in the remotest degree. I am dealing simply with those questions which we have recognized from the foundation of the government as subjects for the legislation of the States.

Now this code of private international law in a good many of its provisions dealt with such subjects. There were other subjects with which it dealt, if my memory serves me, which could properly have been the subject of legislation by Congress, and there were still other subjects about which there might be doubt whether national legislation could deal with them. In almost all the matters that were under consideration in connection with the code of private international law the subjects were such as raised the question of desirable uniformity of legislation.

Now quite apart from constitutional questions, it was recognized by the American delegates that it would be quite futile for them to agree upon a convention dealing with a variety of matters as to which State legislation might be regarded as natural, or with some other matters as to which Congressional legislation could be regarded as natural, when there was, as to al-

most every one of the topics, no chance whatever, so far as we could look into the future, of any such legislation being adopted. It was, therefore, thought preferable, as representing the United States, that we should not raise hopes which were destined to be disappointed, and that it was consistent, as I thought I said last night, with our conception of our government and of the jurisdiction of our forty-eight States, that we should not take part in that particular convention.

I do not wish to extend these observations so as to deal with the question of the treaty-making power with regard to dual nationality, but I may take this opportunity of saying that the prospect of success in endeavoring to reach an international convention of a satisfactory character upon this very difficult subject will be greatly enhanced if we seek to be as practical as possible. If we should attempt to say that those who are born within the United States were not citizens of the United States, and should not be regarded as citizens of the United States, and to present that question to the Supreme Court in a bald way in an endeavor to have an interpretation of the treaty-making power, I have a notion that there might be a decision which would not be gratifying to those who wish to see the treaty-making power liberally construed. I do not think that the temper of the country, and the views of the Constitution generally held, are such as to hold out any hope that we could by a treaty take those whom the Constitution makes citizens by birth and deprive them initially of that citizenship. It seems to me it is quite a different matter to deal with the question—which is a proper question for negotiation with foreign Powers, a proper subject of a convention—what we shall do with those who do become by birth citizens of the United States and at the same time become citizens of another country under the laws of that country,—what we can do to remedy a situation which has practical consequences of great importance in the administration of our governm ent. It seems to me that on that subject we could reach a practical conclusion and we could advance views which would be helpful in an international conference. Does it not really come down to this: If you start with the conception of citizenship by birth, whether you view it from the standpoint of the individual person and his liberty and rights, or whether you view it from the standpoint of the government which desires to retain power over certain classes of individuals, you have a situation which creates international difficulties which should be resolved by agreement in a sensible manner.

It seems to me entirely unlikely that governments will give up the doctrines which they may have with respect to what creates citizenship by birth, but it does seem to me that they might desire to have practical rules which will prevent a conflict of rights and duties of citizenship at a given time. And then does it not come to a question whether those rules should center in a mere declaration or in a declaration of intention in connection with domicile. If you centered them on a mere declaration you would have a very serious situation. I do not believe that a treaty would be approved, or that

legislation would be approved, which would allow a person born in this country and living in this country, being domiciled here, by a mere declaration to make himself an alien, a citizen of another land and in that way expose the country to all the difficulties which might arise through an assertion of authority over him by the country which he does choose, although he continues to reside here.

Then we have to consider in connection with domicile, assuming that to be a requisite, whether it is to precede or be subsequent to a declaration. We shall probably need a number of qualifications to fit particular cases with respect to those who are abroad in connection with business matters, with respect to those who are serving their country in various capacities but continue to live in a foreign land. It strikes me that we need not seek some absolute formula without qualification, but that the most difficult classes of cases can be taken care of by provisos in connection with a formula which, except for such limited application, is found to be generally satisfactory.

Now I trust in this discussion of dual nationality that we will not aim so high that we won't hit anything. On the contrary, I hope that we shall try to make a practical contribution and approach other governments on sensible lines in order to get rid of existing difficulties so far as we can, and in the future we may be prepared for even greater advances.

So far as women are concerned, I think the time is not far distant when we shall have to recognize that woman will stand on her own, and that she will be entitled to be treated as an individual; that she has certain rights and duties, and is entitled to have her status defined not entirely with consideration of her relation to her husband but in recognition of the fact that she has individuality. She cannot, of course, go with her husband to another land and live there indefinitely, disregarding all her obligations of citizenship, and preserve a theoretical relationship to our country because of some advantage she may hope may accrue to her or for reasons of sentiment. We should not permit a man to do that. Rights and duties go together in connection with citizenship. I think the married woman question can be solved with due regard to the "new freedom" and at the same time with regard to what is appropriate in connection with the maintenance of the privileges of citizenship.

I beg your pardon for taking up your time.

Mr. JAMES O. MURDOCK. The discussion so far has dealt with the immediate problems of nationality and dual nationality, but what is the general historical trend of the theory and practice of nationality? In what cycle of the development of nationality do we find ourselves today? Until late in the last century the old pretension of inalienable allegiance persisted—once an Englishman, always an Englishman.

We live today in a fifteenth-of-a-second news world. Transmission of radio messages to the antipodes is accomplished in that time. Economic opportunities which may initiate emigration are broadcast rapidly. The development of fast ocean and rail transportation today greatly facilitates

wholesale transfers of population from one nation to another. The economic lot of the immigrant is cast with the country to which he immigrates. As a practical question, why should not his political duties also be transferred to the new state so that citizenship rights and duties will be enjoyed in and due to the same country? The country conferring the benefits of protection and livelihood should enjoy the benefits of political allegiance. The individual possibly may profit by enjoying rights and privileges where he lives and, being thousands of miles from the country of his allegiance, evade the duties of citizenship.

Let us consider the social and political organization of the states affected. Is the abandoned state of residence benefited by having its erstwhile citizen living permanently abroad calling for protection from the four corners of the world, but performing few or none of the duties of citizenship back home? Is the state to which the immigrant comes benefited by having hundreds of thousands of individuals living within its borders gaining their livelihood there, but subject to none of the duties of citizenship? If emigrants are to create permanent islands of foreign allegiance in the countries to which they go to live, what is to give any state an effective control over their duties as citizens? Surely the country which they leave cannot act effectively. The country which they come to live in is confronted with an increasing alien population problem and the possibility of frequent interference from abroad for the protection of alien rights, based upon standards possibly not yet realized locally or even unknown.

Does not the solution of the tangled difficulties created by increasing immigration and dual nationality lie in bringing the rights and duties of the individual together in the country in which he chooses to earn his livelihood and permanently reside? Is not the trend away from the recognition of artificial political ties to the state a man has abandoned for all practical purposes? Will not the theories of nationality have to be brought into conformity with the facts? The individual who moves to a new country to establish a permanent residence, a new domicile, will be held to move the seat of his political duties and affections. Such a law of nationality will relieve the state the emigrant has abandoned from being called upon for protection. It will prevent many international problems regarding the protection of so-called citizens abroad from arising. It will enable the state where the immigrant lives to enforce the duties of citizenship. It will make the immigrant a more desirable inhabitant, for he will not only reap the benefits of citizenship where he lives—he will promptly assume the duties. Nationality will become more fluid and flexible. It will conform to the fact of domicile. Under such a system, towards which we are moving, the problems of dual nationality would rarely, if ever, arise.

Mr. JOHANNES MATTERN. The definition of dual nationality accepted in the present discussion of the subject implies the claim on the part of two or more states at the same time to the allegiance of one individual to the full ex-

tent of all his rights and duties. But it seems to me that there is another definition according to which I should speak of a "limited dual nationality."

In 1914 there was a great deal of criticism of the so-called Delbrück Law, the German Citizenship Law enacted in 1913. As shown in the discussion in the Reichstag, the framers of that law claimed that it was based on the practice of the British Nationality Act of 1870, which, by the way, was replaced in 1914 by the British Nationality and Status of Aliens Act. This claim was, of course, unfounded. There was quite a difference between the German Citizenship Act of 1913 and the British Nationality Act of 1870. The difference was this: the German Act permits German citizens abroad to accept foreign nationality and to petition the National Chancellor for the retention of the German citizenship provided that (1) the country where foreign citizenship has been accepted does not require an explicit statement of the surrender of German citizenship, and (2) that no treaty exists between Germany and the foreign country concerned excluding the practice of such dual nationality. The British Act allowed British citizens who, before the passing of the Act, had voluntarily accepted foreign nationality to regain their British citizenship within two years after the passing of the Act of 1870. It further allowed British-born individuals in future to assume foreign nationality and to seek readmission to British citizenship. In both instances the condition was made that within the limits of the foreign state in which the individual has become a citizen he shall not be considered a British subject unless his foreign citizenship is at the same time forfeited by the readmission to British nationality or by existing treaty provision.

It seems to me that the practice of the British Nationality Act in force from 1870 to 1914 is based entirely on domicile, the individual in question not being considered a British subject unless he again touches British soil. This practice might well be of aid in the contemplated codification of international law as far as it pertains to dual nationality.

Mr. RALPH R. LOUNSBURY. Professor Garner—I am sorry he left—if I understood him correctly, saw no difficulty as to the matter of the Fourteenth Amendment being a bar to the formula which Colonel Bouvé has suggested, believing, if I understood him, that the individual should have, or might have, an election in these cases; and I suppose that was stated by Professor Garner on the theory that an individual may always waive a privilege which the law accords him. But, if I am not mistaken, the courts have held that this rule does not apply where a government is concerned. It only applies where it is a case of sure personal privilege, as where one may waive a statutory right. The question of citizenship is something very much beyond a mere matter of personal privilege. It is a matter in which the government is concerned as well as the citizen; and therefore it seems to me that this provision of the Fourteenth Amendment cannot be brushed aside as lightly as I think Professor Garner attempted to do.

President HUGHES. Is it your desire to discuss this matter farther?

If not, we shall take an adjournment at this time until half past two this afternoon, when we shall meet to discuss the question of the responsibility of states for damages done in their territory to the person or property of foreigners, and we shall have the pleasure of listening to Professor Hill's address to open the discussion upon that subject.

We will now stand adjourned until two-thirty o'clock this afternoon. (Whereupon an adjournment was had until 2.30 o'clock p. m.)

THIRD SESSION

Friday, April 27, 1928, at 2.30 o'clock p. m.

Mr. President, Hon. CHARLES EVANS HUGHES, took the chair.

President HUGHES. The meeting will please come to order.

The subject this afternoon is the responsibility of states for damage done in their territory to the person or property of foreigners. The address will be made by Professor Charles E. Hill, Professor of Political Science at George Washington University.

RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

BY CHARLES E. HILL

Professor of Political Science, George Washington University

The desirability of embodying in a convention the principles of international law on this subject was submitted by the Committee of Experts to the governments of the various states of the world. Twenty-five responded favorably and without reservations. Among them were: Germany, Argentina, Brazil, Chile, Spain, Sweden, Great Britain, and the United States. Five other states responded favorably with reservations: Austria, Cuba, Denmark, Italy and Egypt. Four states did not think that the drafting of a convention would be either possible or opportune: France, Japan, Netherlands, and Venezuela.[1]

Various bodies have taken an interest in the responsibility of states for damages to the persons and property of foreigners. Professor Karl Strupp of the University of Kiel has prepared a draft of a convention. So has the American Institute of International Law, meeting in Rio de Janeiro last April, and the International Commission of Jurists meeting in Havana in January of this year. The Association of International Law in Japan has prepared a draft, and the Institute of International Law, meeting at Lausanne last August, has prepared probably the best draft so far.

Since the Committee of Experts appointed by the Council of the League has enlisted a large coöperative effort and has obtained favorable replies from thirty governments, I shall select for discussion a few propositions from that report. Dr. Gustavo Guerrero of Salvador, as *rapporteur*, prepared the report and it reflects therefore the views of a statesman in a Latin American country. In several instances his report was modified after the discussion in the Committee of Experts.

The First Proposition.—Acts of officials within the limits of their com-

[1] AMERICAN JOURNAL OF INTERNATIONAL LAW, Special Supplement, Jan. 1928, p. 15.

petence are truly the acts of the state; and if these acts are contrary to international law, or a treaty, or customary law, and affect adversely the rights of another state, a responsibility is incurred. If a foreigner suffers damages under such circumstances, the state is obliged to make compensation. A summary of the opinion of the president, M. Fromageot, in the case of Randolph Hemming before the British-American Claims Commission, will show how a state becomes responsible for acts of its agents, performed within their competence.

In 1894 and 1895 the United States consul in Bombay found that American gold coins were being counterfeited in India. He reported the fact to the Secretary of State and asked for instructions. No instructions came. He employed a lawyer, Hemming, to furnish advice and to help prosecute the offenders. The consul informed the Secretary of State that the lawyer had been retained. The Secretary of State made no objection or criticism of the steps taken. When the proceedings came to an end, Hemming asked for a fee of two thousand dollars. The consul so reported and recommended that the fee be reduced to five hundred dollars. Correspondence between the Treasury and the Department of State revealed that the government decided not to pay the fee on the ground that the consul had no legal authority to employ private counsel to perform duties belonging to the officers of the Crown. This refusal to pay was not communicated to the consul or to Hemming.

Ten years later Hemming addressed the American Embassy in London but received no reply. In 1908 Hemming came to Washington and presented his case to the committees on claims. The committees reported favorably; but Congress took no action. In 1910 he appealed to the British Government for assistance. As a result his case came finally before the British-American Claims Commission in 1920. That tribunal decided that the Secretary of State had tacitly ratified the employment of Hemming and that the United States had thereby incurred responsibility. Taking into account his services, expense and trouble, the award was fixed at twenty-five hundred dollars without interest.[2]

There are cases pointing to a distinction in the responsibility incurred by a state as between the acts of superior and inferior officers.[3] But the chief distinction appears in the remedy rather than in the substantive law. The remedies afforded are usually more ample for the acts of inferior officers. However, in both classes of cases the remedies provided by the local tribunals must, as a rule, be exhausted.[4]

[2] Nielsen Report, 620. Mr. John J. McDonald has suggested that it might be valuable to place in apposition to the case of Hemming the case of the United States of America on behalf of the American Short Horn Breeders' Association *v.* the United Mexican States. Report of General Claims Commission, 1927, pp. 280, 287.

[3] Cases of Bensley and Lewis, Moore, Arbitrations, 3017 and 3019.

[4] Case of Smith, Moore, Arbitrations, 3146; Digest, VI, 660; Hyde, International Law, I, 492.

The Second Proposition.—The act of an official outside the scope of his competence, that is, in excess of his powers, does not involve his state in any responsibility. Precedents exist to the contrary; but precedents furnish no guide. "Positive international law cannot derive its strength from sources which are so exiguous and so conflicting." After Dr. Guerrero had presented his report, he added these three exceptions: A government incurs responsibility if it knows that an official is about to commit an illegal act against a foreigner and does not take timely steps to prevent the act; or, if after the act has been committed, the government does not with due speed apply disciplinary measures and inflict such penalties as the laws provide; or, if no means of legal recourse are available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner.

Perhaps the claim of Agnes Connelly before the Mexican-American General Claims Commission will show as well as any case the application of the principles added by Dr. Guerrero after conference with the experts. Agnes Connelly's brother, John Connelly, American citizen, was managing engineer for the construction of a tunnel at Angangueo, Mexico, in 1880. A laborer, Medina, came to Connelly's house to collect a sum of twelve cents. Connelly considered his conduct offensive and ejected him. Medina returned with several companions and found Connelly sitting in front of his house. They threw stones at him and Medina approached with a drawn machete. Connelly fired several shots in the air and went inside. Medina attempted to enter. Connelly fired a shotgun at him and wounded him in the legs. Soon a threatening mob of about a thousand people surrounded the house. On the advice of his employer, Connelly offered to surrender himself to the police; but the mob drove him back into the house. Request was made of the mayor for protection. He came but could not quiet the mob. He called for a company of the state troops. Lieutenant Mora with ten soldiers appeared; but they, instead of dispersing the mob, joined the mob in the attack on Connelly's house. The roof caught fire and Connelly had to run and was killed, March 14, 1880.

On March 17, the President of Mexico directed the Governor of Michuacan to take all possible measures to discover and bring to punishment those responsible for the murder. Action was brought against twenty-nine. Only eighteen were arrested and they were released on nominal bail. Seven were acquitted. The prosecution of the other eleven had not been pressed by 1887. Five were condemned to capital punishment but they were not even arrested.

Through diplomatic channels the United States asked that the offenders be punished, and presented the claim of the relatives of Connelly. The participation of the troops in the riot was stressed. The Mexican Minister of Exterior Relations denied liability on the ground that there had been no negligence. The reply of the Department of State furnished a wealth of

evidence; but there the matter rested until the Claims Convention of 1923. The commission rendered its decision November 23, 1926.

The commission found that the Mexican Government had not used due diligence in bringing to justice persons that might be reasonably suspected of guilt. Counsel for Mexico had contended that she should not be held responsible for the acts of her soldiers when they had exceeded their lawful powers. So far as the soldiers had taken part in the riot, they had acted in a private capacity. The decision cites several instances in which a state had been held for the wrongful acts of soldiers while under the command of an officer. The decision states: "There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts." The award was for $18,000 without interest.

The United States recognizes generally responsibility for the acts of its soldiers when on duty. Three cases may be taken out of a number recommended by the President to the present session of Congress for payment "as an act of grace and without reference to the legal liability of the United States in the premises." Great Britain in behalf of Samuel Richardson, a British subject, presented a claim for $1,000. Richardson resided at Consuelo, Dominican Republic, in November, 1921. He was killed by a bullet fired through a door, presumably by a marine. The Secretary of the Navy stated that there was strong probability of guilt and recommended a suitable indemnity based on the fact that the Marine Corps had taken over the police authority and protection of the locality.[5]

Edwin Tucker, a British subject, on December 6, 1924, was standing in front of a drug store at Colon, Panama, when a United States Army ambulance, exceeding the speed limit, crashed into the drug store and killed Tucker. In such cases the United States does not allow itself to be sued. The British Embassy in Washington asked for $2,500 as compensation to Tucker's dependents. The President recommended that the amount be appropriated by Congress "as an act of grace without reference to legal liability."[6]

Sun Jui-Chin, a Chinese in his ricksha, was passing a guard of the American Legation in Peking. An altercation arose and the marine struck Jui-Chin and inflicted several minor bruises, June 11, 1923. The marine was court-martialed, sentenced to a year in prison at Cavite to be followed by a dishonorable discharge. Jui-Chin asked for compensation to the extent of about $1,000 Mexican. The commandant recommended $500 Mexican. The American Legation approved this amount. The President recommended that Congress appropriate this sum "as an act of grace and without reference to the legal liability."[7]

When Congress makes the appropriations satisfying literally hundreds

[5] Sen. Doc. 21, 70 Cong., 1 sess. [6] Sen. Doc. 20, 70 Cong., 1 sess.
[7] Sen. Doc. 23, 70 Cong., 1 sess.

of claims of foreigners, it may very well be contended that the United States recognizes its responsibility, the clause "as an act of grace and without reference to legal liability" to the contrary notwithstanding.

Moore in his *Digest of International Law* and in his *International Arbitrations*, Borchard in his *Diplomatic Protection of Citizens Abroad*, and Eagleton in his forthcoming book on the *Responsibility of States in International Law* furnish numerous examples of states incurring responsibility for the acts of police officers, port and customs officials, privates on duty as well as officers in the army and the navy, and diplomatic agents. Borchard says that the legislature is an organ of the state for whose acts the state is directly responsible. (Page 181). It is therefore the duty of the state to see that its codes and statutes are in accordance with international law. The lapse on the part of Great Britain in connection with her neutrality laws during the American Civil War cost her $15,500,000. At the moment I think of only one Act of Congress that was declared void because it contravened international law.[8] The Act of June 25, 1798, authorized American merchantmen to resist forcibly any attempt by a French war vessel to exercise visit and search. Our treaties have been remarkably free from provisions that conflicted with international law; but the Treaty of Guadalupe Hidalgo provides for a territorial boundary nine miles out to sea instead of three.[9] Even a constitutional provision may not prevail against international law, when responsibility for a wrongful act to foreigners is concerned. Peru made that discovery in the case of the Canevaro Claims.[10]

The report quotes the Department of State twice and the British Foreign Office once in support of the contention that the courts cannot involve the state in responsibility so far as damages to foreigners are concerned. It is further laid down that the state is in no way responsible for abnormal delay or manifest injustice.

Judges are not ordinarily liable under domestic law for their official acts; but they may involve their country in delicate questions of responsibility for damage to the persons and property of aliens. That is true even in states where international law is considered a part of the law of the land. The report does not discuss the question of the exact moment when the responsibility of the state is incurred. It is probably correct to say that any judicial decision that conflicts with international law engages immediately the responsibility of the state. Judge Dawson in Alaska condemned several British vessels for engaging in fur seal fisheries beyond the three-mile limit on the assumption that the vessels had violated American territorial jurisdiction over Behring Sea. As a consequence the United States had to pay damages. In at least one instance of damage to a foreigner, the ship *Circassian*,[11] the

[8] The Ship Rose, 36 Court of Claims, 290.

[9] For protest by Great Britain and interpretation by the United States, see P. C. Jessup, Law of Territorial Waters, 52, 53; Moore, Digest, I, 730.

[10] G. G. Wilson, Hague Arbitration Cases, 238.

[11] Moore, Arbitrations, 3911.

United States Supreme Court had its findings completely reversed by the American and British Claims Commission under the treaty of May 8, 1871. And in five other cases the decisions of the Supreme Court were modified.[12] It is hardly necessary to say that in every one of the cases the United States accepted responsibility and made payment in full. Dr. Guerrero in his draft specifies, and correctly so, that a state is responsible for damage caused to foreigners when it is guilty of a denial of justice. Denial of justice consists in refusing to foreigners easy access to the courts in accordance with local law.

With regard to the acts of private individuals, the Guerrero draft states: "Losses occasioned to foreigners by the acts of private individuals, whether they be nationals or strangers, do not involve the responsibility of the state." The Institute of International Law in its draft provides the exception when the injury results from the fact that the state has omitted to take measures to which it was proper normally to resort in order to prevent or check such action. (Article III).

All of the drafts hold unanimously that the federal state should be equally responsible with the centralized state. Karl Strupp of Kiel states the principle succinctly: "In composite states (federations, confederations, protectorates) the sovereign state is responsible for the inferior or protected state." (Article V). A vast field opens up here in connection with contract debts. I shall leave the subject by referring to the interesting and able article by Charles P. Howland on "Our Repudiated State Debts," in *Foreign Affairs*, April issue, this year.

In regard to injuries suffered by foreigners due to mob violence, riot, or civil war, Guerrero argues in his report that these are acts committed by private individuals and that therefore no responsibility is incurred by the state. This statement is somewhat modified in the conclusions after discussion in the Committee of Experts. Exception is made for riot directed especially against foreigners and for the loss of property by foreigners through requisition, expropriation, confiscation or spoliation. And if a state were to deprive foreigners of all means of action against the rebels by passing a law of amnesty, the state would become internationally responsible.

On the subject of mob violence let me refer to the excellent paper read by Robert Lansing on that subject before this society just twenty years ago.[13] The United States holds other states responsible for injury to Americans due to mob violence, when the officers have not exercised due diligence in seeking to prevent the injury or have failed to furnish means of redress. Under like conditions the United States assumes responsibility for mob violence and has repeatedly made compensation. We might wish that the machinery for redress could rest with the judiciary rather than with Congress. But that is a matter of internal administration.

[12] Moore, Arbitrations, *Hiawatha, ibid.*, 3902; *Springbok, ibid.*, 3928; *Sir William Peel, ibid.*, 3935; *Volant and Science, ibid.*, 3950.

[13] Proceedings of the American Society of International Law, 1908, p. 44.

Finally.—Should a dispute occur as to whether a state has incurred responsibility, the Guerrero report recommends that a commission of inquiry ascertain whether the facts give rise to a question of international law and whether the state has incurred responsibility. Mention is made of the successful use of this plan in the Dogger Bank incident. The report suggests that the Permanent Court of International Justice be made the intermediary between the parties. On receiving a request, the court would invite the parties to appoint commissioners to proceed with the inquiry. It would appear that this is not strictly a judicial function and that the Council of the League could act to advantage. The Council has performed this function remarkably well, notably in the Greco-Bulgarian dispute in 1926.

President HUGHES. The matter is now open for discussion and I hope there will be many speakers on this very interesting subject to which you must have given a good deal of attention in your studies.

Mr. JOHANNES MATTERN. The speaker has cited several cases tending to show that the United States has accepted the principle of responsibility for damage done to aliens by *ultra vires* acts of its agents. In his discussion of these cases he has referred to the United States and sometimes to the United States Government as the responsible party. I think the speaker will be delighted to tell us what he means by this differentiation between the state and the government or between state and government responsibility. If he maintains that it is the state which is responsible he may be good enough to explain how a state can be held responsible when it admits responsibility only by its own free volition, which means that it accepts responsibility not in a legal but only in a moral sense.

Professor HILL. The distinction between the United States being held responsible and the Government of the United States being held responsible is not quite clear to me and I should like to have enlightenment upon that point. About the Secretary of State being held responsible, that was not my meaning. I must have mis-spoken myself if I so stated. My understanding was that the act of the Secretary of State brought on the responsibility of the United States, whether it is the United States Government or the United States I hardly appreciate the difference. There was evidently another idea in the speaker's mind which I did not gather clearly; if he wants to restate that question I shall either attempt an answer or leave it for someone else.

Mr. MATTERN. The difference between the responsibility of the state and the responsibility of the government has not yet been made clear.

Professor HILL. There is no distinction as far as I am concerned.

Mr. MATTERN. I see a distinction.

Professor HILL. Would you enlighten me?

Mr. MATTERN. That brings us back to the question which at this time is causing a good deal of discussion, *i.e.*, the question of the juristic conception of the state and that of rights and duties of the state under this

theory. In certain quarters the juristic conception of the state is declared to be a discarded myth, but the number of articles which are appearing on the subject of state and sovereignty proves quite the opposite. Under this doctrine the state is conceived as the entire nation of which the government is only a part, call it the nation's or state's agent or what you will. I can well conceive that the government, not the entire government, but one or more branches, could be held to such responsibility. But as much as I should like to see such responsibility enforced upon a nation or state, I can discover no agency within or outside the state capable of doing so. I can imagine that the United States would do what Prussia has been doing since 1850, Germany for generations, and France since the beginning of the present century. Thus the United States may place upon its statute books a federal law assuming responsibility for violations of the rights of aliens by the *ultra vires* acts of its agents as the law of the land. But upon whom would such a law be legally binding? Probably upon the federal courts and the Treasury as branches of the government. If and when the United States assumes such responsibility by general federal statute, Congress will not have to be called upon by the President to vote the payment of damages in the individual instance and as a matter of grace, as has been done in the cases cited by Professor Hill. It may then be simply a question for the federal courts to decide whether and to what extent injury to an alien has been done and for the Treasury to pay the compensation allowed by the court. This is the distinction I make between state and government responsibility: The United States would assume such responsibility for purely practical reasons, say in order to be a nation of good standing among other nations or under political pressure at home. The formal assumption would still be an act of its own free will and determination. The responsibility thus assumed would undoubtedly be a binding responsibility for the state and nation, for public opinion is a powerful enforcing agency. But it would not be a legally binding responsibility except for the particular organs of the government upon whom the federal law establishing such responsibility would place the legal duty of determining the damage inflicted and of paying the compensation allowed. Thus the President would be legally bound under the law enforcement clause to hold, say the federal courts and the Treasury, to compliance with the terms of such a law, but who could force the Congress to enact such a law if public opinion and reasons of state were antagonistic to the assumption of such responsibility? If I have made the distinction between state and government responsibility clear, I shall be glad to be told so.

Professor HILL. That is very clear, thank you.

Professor ELLERY C. STOWELL. I wonder if we could not call on Mr. Eagleton to discuss some of these points?

Professor CLYDE EAGLETON. Mr. Stowell, I would rather attempt to survey the problem and then state one particular phase of it which I think needs emphasizing rather than take up particular points.

The problem, I think, is divided into three phases,—I mean the problem of codification of the subject of responsibility. The first of these phases is the substantive law of responsibility. The second is the procedural aspect, the legal remedies and diplomatic interposition; and the third is the pacific settlement of disputes at the end.

As to the first, there is practically no disagreement. Everyone will agree with the statement that the state is responsible for any international illegality it has committed. The third phase, pacific settlement, connects itself up with the whole problem of the peaceful settlement of international disputes, although it might be necessary—on the principle that a bird in the hand is worth two in the bush—to include provisions for peaceful settlement in this code.

The second one, the rule of legal redress, is one that I think needs a great deal of emphasis, and within which most of the dispute is to be found. You are all quite familiar with the rule that the state must exhaust legal remedies before diplomatic interposition may be proper, but I do not know if you have ever considered the value and the importance of that rule. It has several aspects. For the first thing, it adds to the convenience of international intercourse. It would be an intolerable burden if foreign offices were called upon to take care of every claim presented by their citizens abroad, that every time an alien got his toes stepped on he should have the foreign office coming to his rescue. Now all such cases are taken care of by the courts of the state in which he is found, primarily, and thus the foreign offices are relieved of a great burden of claims.

The most important thing about the rule of local redress is that it represents a happy compromise between the principle of exclusive territorial jurisdiction, upon the one hand, and the right of protection which a state has for its own citizens abroad, on the other hand. There, of course, is the real conflict. If international law, if the community of nations, grants to a state exclusive jurisdiction internally, it does so only upon the condition that the state will assume responsibility for the protection of the rights of aleins under international law within its territory. That should be understood. An alien submits himself to the jurisdiction of the state where he goes, but he does not surrender entirely the right of protection from his own state. A compromise between these two forces is represented in the rule that local remedies must be first exhausted.

The rule of local redress is somewhat puzzling. It has a double function to serve. It may serve as a discharge of responsibility which the state has because of its antecedent obligations; or it may serve to create an original responsibility. It is ordinarily said—there is room for debate here, but I cannot stop to debate it—that the state is immediately responsible for acts of its agents only, that local remedies need not be sought against such acts of such agents of the state. Personally I am inclined to think they should be sought in the case of state agents very widely; but in the case of individuals'

acts there is no responsibility until local remedies have failed, until, if you want to say so, there has been a denial of justice.

What I am saying now is a suggestion for codification and is not meant as a statement of practice. I should like to see the rule of local redress very much strengthened. I should like to have it said, in the first place, that the state is responsible for any injurious act suffered by an alien whether by the act of an individual or by the act of government. Now, that I had not better stop to discuss. It is radical and will not get much support. I merely point out that the decision of the case will be little, if any, altered. But there is another phase of it which I think is more general of acceptance and would simplify matters a good deal.

There are quite a number of exceptions to the rule that local remedies must be exhausted. For example, Mr. Borchard, I think—I do not know whether he is here or not to take me up—would say that for acts of agents in most cases diplomatic interposition would be permissible at once without resort to legal remedy. In the Mexican Claims Commission there have been a number of cases lately in which diplomatic interposition was permitted at once and when the rule of local remedies was not called upon. Lack of due diligence has frequently been held to give grounds for diplomatic interposition before local remedies are called upon. I think it would simplify matters very much if we could say that diplomatic interposition shall be permitted only in case of the denial of justice, if by that you mean only in the case of the failure of local remedies. That would eliminate a number of diplomatic interpositions in a good many cases where we now have it. It would not, however, go so far as the Latin-American states, which would permit diplomatic interposition only in case of the denial of justice and then limit the denial of justice to the refusal of access to the court. This would imply also a much greater recognition of the judicial systems within the state than we have been so far willing to give. I think unquestionably that the administration of justice within the state has been improved to such an extent that we can now permit that rule; but if it does not reach up to the international standard we would still have a claim.

Dr. James Brown Scott. If it is proper, I should like to make a suggestion. Mr. Ralston is present and he has had very great practical experience in these matters and his theoretical competence is evidenced by recognized texts on the subject. It would be a great pleasure to some of us if he would give us the benefit of his experience and investigation.

Mr. Jackson H. Ralston. Mr. Chairman, I am very much afraid that at this moment at least I ought not to follow the very broad invitation given by Dr. Scott. My reason is simply this, that I was so unfortunate as to only just come into the room and I have not had an opportunity of getting the general tenor of the discussion and learning the particular phase under consideration, so that regretfully I must ask for a moment at least to be excused.

President HUGHES. I might say, Mr. Ralston, that there has been no limitation of the discussion, and I would say that any phase of it that you would desire to present would be one on which we would be very glad to hear you.

Mr. RALSTON. I hate to say anything, as it were, on the spur of the moment. The question which, I judge, has been raised, is certainly one of very great importance. I presume perhaps my only excuse for following your kind invitation would be perhaps by referring to some personal experiences, and I hardly know where to begin there.

I judge that the general question under discussion is that of the responsibility of states for the acts of their agents. I can only say that that matter has received a great deal of consideration from different points of view. One matter which may have been under consideration here is that of the responsibility of states, if you please, for the acts of revolutionists. That goes, to the fundamentals as to whether and how far revolutionists are the representatives of the state and, if you please, the agents of these states. That is something which has received consideration at The Hague of late or rather at Geneva, I should say, in connection with the proposed codification of international law. The South Americans have been very insistent upon the fact that responsibility ordinarily at least did not exist on the part of the government for the acts of revolutionists. Broadly speaking, in fact it has always so seemed to me they were in the right. In other words, there could not be a different view adopted in our dealings with the South American countries from the rule which we have adopted ourselves. We have with very great emphasis, for instance, insisted that the Southern Confederacy was in no respect the agent of the United States and that the United States was in no degree responsible for any action which was at any time taken by the States of the South. So that, to that degree, we are in accord with the general South American doctrine. Of course there are exceptions to that, for instance, where the revolutionists become successful ones. There the action of the revolutionists becomes by a sort of doctrine of adoption, if you will, the action of the government finally recognized as legitimate, and that responsibility has been held to exist in South American states.

I remember, and perhaps may be pardoned for referring to a personal experience when it was my fortune now twenty-four years ago to be the umpire of the Italian-Venezuelan Mixed Claims Commission, this was one of the questions which met with most consideration before the other Americans who were at work there and before the commission over which I had the honor of presiding. The Italian Commissioner looked at the subject from what seemed to me at least a rather crude point of view. He said to me, "Venezuela ought to be held responsible for all of these acts." I asked him why, and he said, "Because Venezuela is a bad child and ought to be whipped." Well, that doctrine possessed at least the merit of simplicity, but it did not, as it happens, appeal to me very much, and I remarked that I was not there for the purpose particularly of whipping Venezuela, that if Vene-

zuela had violated the rules of international law it was of course my duty to decide against her, but if she had not I did not conceive that it was incumbent upon me to administer any measure of castigation. Well, my view did not at all commend itself at the time to him and I do not know that it has to this day, for he still happens to be living. He said, "Well, if I had thought that you and the American umpires were to treat Venezuela from any such point of view as this, that you would not accept our claims as we put them forward, I would have recommended my government to send Pierantoni." The commissioner was a man whose services had been largely in the consular division of the Italian Government. Well, perhaps they should have sent Pierantoni, but as it was they sent a very able and excellent man, a man however, who could not see why Venezuela should be treated with any respect as a member of the family of nations. We, however, the Americans who were down there, felt that as long as Venezuela was a member of the family of nations, as long as its government sent ambassadors or ministers to the other countries, as long as Italy itself recognized the equality in the family of nations of Venezuela with itself, we were not at liberty to apply anything but what we conceived to be, rightly or not, the rules of international law which were at all applicable to the case.

Now, Mr. Chairman, I have spoken thus far and in an entirely impromptu way and without coming here with any anticipation of being called upon at all, and I have spoken of the first matter which came to my mind which I trust may have some slight interest. Thank you.

Professor PHILIP M. BROWN. The subject that we are treating is to my mind perhaps the most momentous subject for codification, certainly since the lamentable incident at Corfu which raised the whole issue as to the responsibility of the state for a very unfortunate incident. It seems to me that we have no criteria at present, adequate criteria, to fix responsibility, and that it is essential we should devote ourselves to the study of the whole problem of responsibility.

In addressing myself to Professor Eagleton's remarks, it has seemed to me that he has raised one of the most difficult problems. He has referred to the international standard of justice as the test of local remedies. I wonder if Mr. Eagleton could enlighten us further on that subject, on what that international standard is? What are the main features of it? For example, I have in mind the legal procedure in most Latin-American countries where the accused is held *incommunicado*, that is to say, isolated for a certain time without the advice of counsel. I would ask whether such a procedure would fit into the idea of an international standard of justice? That is one instance. In other words, I am raising a question, Mr. Chairman, as to whether we really have an international standard of justice which can in any way be satisfactorily applied in each case under the system of justice prevailing. I would be very much obliged if Professor Eagleton could give us further information on that point.

Professor EAGLETON. I suppose that is one of the most difficult parts of the whole thing, and not merely from the viewpoint which Professor Brown has raised as to what the standard is, but also from the viewpoint of whether you are going to apply the standard in general, and hold a state responsible for everything that happens in it because it falls below the standard; or apply the standard to each particular case that comes up in any particular state. Now I think, generally speaking, that the United States can be said to measure up to the standard; and yet lynch law does not come up to it. Does it apply to a particular case or to the country as a whole? Is the particular case a denial of justice?

You will remember that last year we had a discussion as to whether we could define what due process of law is. I am not willing to let it go because if you do, you have thrown away all the control that international law has. It is a question of building it up from custom, trying it out here and there. Professor Brown's case of incommunicado, I think, has been answered by decided cases.

As to this standard of justice, I would not attempt to define it any more than they have attempted to define what due process of law is today, but I insist we must have it. If you say that the state is free, that you must exhaust all local remedies within the state, you can permit that only if those remedies are up to the international standard. In our committee discussions we tried out the phrase "The standard required by western civilization," but we decided that that would not be fair. We tried to find some phrase to describe it, but have not succeeded yet; and it is a problem that I cannot answer for you.

Professor STOWELL. I wonder if Professor Garner would not say something about this matter?

Professor JAMES W. GARNER. Unfortunately, I came in late and did not hear either Professor Hill's address or Professor Eagleton's. As I was coming over here I happened to pick up the report of the subcommittee of the Committee on Codification dealing with this very subject of the responsibility of state. So far as I know, Professor Hill may have discussed the recommendations of that subcommittee. If he did, I would not care to take your time to go over them. If he did not, I should like to speak briefly on two or three of them, because they represent points of view that I do not believe will ever be accepted in the United States or Europe.

One of them is that there is no denial of justice whenever an alien who has sustained an injury of some kind has been allowed access to the courts. In other words, justice consists in opening the doors of the court to the injured person, and once they are open there is no denial of justice, whatever may be the decision. Now, I do not believe that that proposition is sound or will be accepted. We are often told that the injured party first of all must exhaust the local judicial remedies, but it may happen that there is no local justice to exhaust. That is exactly what happened in Venezuela during the

days of the dictator Castro, and to all the nations which had claims against Venezuela for injuries which their nationals had suffered, Castro in effect said, "There are my courts. You have access to them. Go and exhaust the justice which they were created to administer." The reply to this invitation was that there was no justice to exhaust, because the courts of Venezuela were under the control of Castro. He appointed and dismissed the judges at will, and it was asserted that he even dictated their decisions. Therefore, mere access to the courts is not a sufficient remedy. The alien who sustains a wrong in violation of international law is entitled to something more than mere access to the courts. He is entitled to a judgment, and a judgment based upon international law.

Here is another proposition laid down by this committee, namely, that all a nation is under obligation to furnish an alien is equality of protection. If he has the same protection, if he has the same remedy, the same means of redress which the native has, he has no cause of complaint. I do not believe that that doctrine will be accepted. I believe there is an international standard of justice, even if it is hard to define. Lord Palmerston in the correspondence relating to the Don Pacifico case stated it in the most emphatic way. Mr. Root in one of his addresses as president of this Society confirmed it in the clearest and most vigorous language. Merely because you cannot define it and cannot say precisely what are the elements of this international standard, is no proof that it does not exist. Jurists everywhere feel that there are international standards, in fact the American-Mexican Mixed Claims Commission in the case of Garcia, a Mexican girl who was shot while crossing the Rio Grande by an American soldier, even went to the length of saying that there are international standards for taking human life, for enforcing frontier regulations.

This committee goes on to lay down another doubtful principle, namely, that there is no denial of justice when a court renders a decision. Even if the decision is unjust or erroneous, it does not involve the international responsibility of the state. Now the injuries which nationals suffer, except where they result from the acts of private individuals, are always the result of acts of negligence or acts of commission by governmental organs or governmental agents. They may be the act of an administrative officer, they may be the act of a legislative body, they may be the act of a judicial tribunal. The point I want to make is, if a wrong has been committed and an alien has suffered an injury, it makes no difference what particular governmental organ was responsible for the wrong. Why distinguish between the judicial tribunals, on the one hand, and other governmental organs on the other, and say that there is no responsibility if the act results from the decision of a court, but that there may be if it results from the act of an administrative officer or an act of the legislature. So far as the victim is concerned, it certainly makes no difference to him. I do not believe, therefore, that there is any reason or logic or justice why any such distinction should be made.

Then the proposition is laid down that a state is not responsible for acts committed by private individuals, subject to this reservation, that if it is the result of riot or insurrection and the riot is directed against aliens as such, then the state may be responsible. Well, I hardly need say that European and American states do not act upon that principle. States are often held responsible and compelled to pay damages or they voluntarily accept liability for acts committed by individuals. The cases are abundant and there is no support for the contrary view either in Europe or in America.

One more word about that matter of access to the courts, and I am going to sit down. It is this. I have heard it said frequently that an alien cannot justly complain if a proper forum is provided for him in which he can bring an action for redress. It may happen, and unfortunately it has happened in this country, that recourse to the courts is absolutely futile. Take some of these cases of mob violence, for example, the incident at Rock Springs, Wyoming, where twenty-eight Chinese were lynched by members of a labor union. Now you may say that the local court there was open to the representatives of the families of those victims. The courts were open, but what did they avail? You could not get a grand jury in that community to bring an indictment, and if you could have gotten an indictment, you could not have got a jury to convict one of the accused. Suppose that the victim or his representative brought a damage suit, a personal damage suit against a member of the mob, what avail would it have been? What would have been the value of a judgment against one of those poor Wyoming miners who had no assets, no resources out of which a judgment could be paid?

I submit, in conclusion, that the only possible way by which an alien injured in a community like that and under those circumstances, could get redress is by payment of an indemnity out of the treasury of the United States.

Professor BROWN. I have come here largely to get information and I have been very much interested in what my colleague, Professor Garner, has said. He has spoken of remedies available for individuals who suffer wrongs of any sort for which someone must be held responsible. I entirely agree with him and his comment upon these various recommendations of the committee. It seems to me they are unacceptable, but I would like to press this idea and to stress it, that it involves the whole problem of the status of the individual in international law. Of course, we are all familiar with the classic statement that international law applies only between states, and that point of view of course is presented, is repeated and repeated almost in a parrot-like way by most writers on international law. I am frank to say that I was one of those who accepted it for a long time as being true, but in later years I have come to feel it is entirely out of conformity with actual conditions, that we are beginning to discover that international law, if it has any *raison d'être* whatever, exists for the very purpose of individual rights. It started as a system between sovereign princes who claimed certain rights

as between themselves and certain rights as concerning their own subjects. We have passed in the last two hundred or three hundred years in our political development through various stages of democracy until, it seems to me, we have arrived at this stage in international law where the rights of peoples no longer flow from sovereigns but from the people themselves. A sovereign, whether you speak of the sovereign as a king or as the head of a republican government, exists only as the agent for the people and not as the source of legal rights.

Applying this reasoning to this question of the status of individuals or aliens, it seems to me we arrive at this conclusion: that in the process of time a certain body of rights has grown up, universally recognized in the practice of nations concerning the fundamental rights of aliens; that these rights exist not merely because one alien has a powerful government to present his claim, or that they do not exist because another alien is entirely without a powerful government behind him to present his claim. These rights exist in themselves and there is a standard—which I agree with Professor Eagleton and Professor Garner is hard to define,—there is a standard of international justice which we may invoke in behalf of individuals who may suffer various wrongs. It is, therefore, intolerable to me, the idea that individuals, aliens who are discriminated against, who are submitted to injustice, who are denied the fundamental rights of international justice, should be told that they have no rights other than those which a particular government may assert.

It would seem that out of the very basic rights of international law, for example, the basic primary right of a state to exist, flows this consequence; that international intercourse is an essential right of a nation, that citizens who belong to states that are members of the family of nations generally travel abroad with these rights. Now what are those rights? The right of personal liberty, the right to their personal property, although of course we here run counter to the doctrines of the Soviet Government, the right to religious worship, if you wish, to freedom of conscience, the right to earn one's livelihood, the means of carrying on his business, for example, the right of the simple fisherman or seaman to ply his industry the world over. Surely those are rights which do not have to be formulated by any special nations. They are rights which are recognized by any reputable tribunal, national, or international. Take the case of *The Paquete Habana*, an interesting example of what the Supreme Court of the United States will do to protect the rights of men engaged in a hardy livelihood. You may enumerate other instances to prove that we are in a stage of development of international society where individuals as individuals are recognized now as having fundamental rights.

To make my remarks more practical, I would like to present to you this thought, that there is a gross injustice in any procedure at the present moment whereby an individual, unless he is backed by a powerful government,

finds it extremely difficult to prosecute and maintain his rights as an alien. This fact has been brought out by representations to the Permanent Court of International Justice in a most interesting way. The court repeatedly has appeals from individuals, desperate appeals, asking the court if it cannot afford them remedies, cannot give them justice. Of course, the court can only reply under its present statute that it only deals with cases between states, that it cannot deal with these complaints of individuals. Now, is not that in itself a most unfortunate and lamentable state of affairs? Would it not seem to point in the direction that we should provide an international tribunal, comparable to our own Court of Claims? We know that here in this country an individual can only get redress for a certain limited category of claims against the government, but at any rate we have a Court of Claims to which an individual may make appeal. Then, why may we not now at this stage in the development of international society visualize the possibility of an international court of claims which would sit for the purpose of deciding many of the matters which are being discussed by the Committee on Codification concerning the responsibility of states, whereby an individual without having to wait for the laborious negotiation of diplomats, or the doubtful action of statesmen, could bring his case before a reputable court, an international court of this nature.

This does not seem to me theoretical; it does not seem to me to be Utopian. It seems a very practical step to be taken in the near future, and I would like to address the attention of those dealing with the subject of the responsibility of states particularly to this practical suggestion, that we should urge the establishment of another tribunal, an international court which will be competent to deal with many of these cases of appeals of individuals for remedies for wrongs done at the hands of responsible governments.

Professor PERCY E. CORBETT. I am not sure whether I got the exact description of the report from which Professor Garner was quoting, but I think he referred directly or indirectly to a report of the League of Nations Committee. I thought that it would be of interest to him and to others here to know that that report has been completely superseded by the Preparatory committee which took the place of the Committee of Experts on the Codification of International Law. The document has been replaced by a questionnaire sent out to the various governments, members of the League, which recognizes in its first paragraph the existence of a standard of international justice and which discards the proposition that a state is responsible for the acts of a private individual only in connection with a riot. I thought it important that this should be fully realized; we appear to be discussing a superseded report.

Professor ROBERT R. WILSON. I dislike very much to impose upon Professor Eagleton, but I have been very much interested in his very instructive remarks. Professor Eagleton has raised the question of linking the matter of responsibility with the question of obligatory arbitration, and

Professor Brown has presented the desirability of an international court of claims. I should like to ask Professor Eagleton whether he thinks it is possible at the present time to phrase, in view of the difficulties which have been suggested, a definition of "denial of justice" which might be made the basis for jurisdiction, an obligatory jurisdiction, in at least some of the claims arising in connection with this matter of international responsibility. It seems to me there have been many difficulties presented and I wonder what his opinion is concerning the possibility of phrasing a definition, now, of "denial of justice"?

Professor EAGLETON. That is a pretty big job—to define denial of justice. I have spent several months trying to, and you may be able to see the result of my efforts in the July issue of the *American Journal of International Law*. I cannot do very much more here than sum it up by saying that denial of justice is a failure of local remedies. That is awfully general, and there are quite a number of points that are left unsettled about it. One failure to measure up to the international standard of justice is failure to provide local remedies—is that a denial of justice? Is a denial of justice confined simply to judicial cases, or should it include executive, administrative and legislative as well? I would say that a denial of justice is any failure, whether on the part of the judiciary, or any act of the administrative or legislative authorities which interfere with the process of judicial remedy, which results in the failure of the alien to secure the local remedies up to the international standard. I do not think that I had better try any more than that now.

I have been hoping that some of the other members of this committee would come in, of the committee that is working on this codification of responsibility, but since they are not here, I would like to present to the group a question which has been puzzling us, some of us, and see if we can get some aid from you all. That is, whether or not we should include in the draft code on responsibility a clause to provide for obligatory arbitration or pacific settlement in some form? In other words, should such an article be included in this draft code, and presumably any other draft code which is now proposed, or should we leave the subject of pacific settlement of such disputes to a general convention to be made separately? Should it await the whole program of international organization for pacific settlement of international disputes? There might be the objection raised that such an article in this code might conflict with other arrangements to be made, and that it would be better to leave it out entirely. Now supposing that you put it in on the principle, as I suggested, that a bird in the hand is worth two in the bush, suppose you put it in and oblige yourself to arbitrate all that came up with regard to responsibility, will that eliminate the possibility of a state applying protective measures in advance of damage done, such as we have taken in China and Nicaraugua and elsewhere? Would we have to wait until the injury was done and then arbitrate, or would we have a right to step

in beforehand and protect our citizens before the damage is done, fearing that the injury would occur?

Professor STOWELL. I was much interested in the discussion of the previous question with regard to the matter of the right of the individual to be protected—that is, the right of the individual to secure redress for injuries done him in violation of the international law standard, and also the question of the denial of justice. It seems to me that we should regard this whole question in its procedural aspect and consider what can the injured individual do about it. It was most encouraging what Professor Brown has said about an international court of claims and if we look at it from that point of view the question is, What redress has an individual? We have here a representative of the United States-Mexican Claims Commission, Colonel Bouvé, and I wonder if he would care to say a word on this?

Colonel CLEMENT L. BOUVÉ. Mr. Chairman, the only way in which the question of denial of justice has come particularly to my attention in the last year and a half in connection with my work has been in the conventional way; that is, by the presentation of the question to an international court through an agency of the state of which the claimant who urges the existence of a denial of justice is a national.

Now it seems to me that it would be from many aspects most desirable if there were an opportunity for a national of any state to have a forum to which he could go and before which he himself could be the one to present the conditions under which the wrongs of which he complains were inflicted upon him. Of course, at the present time the only recourse which he has is to make his complaint through an instrumentality of his state, an instrumentality which that government appoints for that particular purpose. The usual principles involved in the presentation of such a case are those with which I have no doubt almost everyone here is quite familiar.

We have been considering cases of the denial of justice arising not necessarily as the result of a wrong perpetrated through the alleged shortcomings of judicial tribunals, but we have proceeded upon the theory that a denial of justice can be perpetrated upon those individuals through an act of a purely administrative official quite apart from a wrong supposed to have been done as the result of the failure of the courts to do their duty. I simply comment on this because I think, generally speaking, it is assumed, in connection with the term "denial of justice," that it is the denial of some right effected by those special instrumentalities whose duty it is to give justice to the individual, the courts. My experience has been in practically the majority of instances that have come to my attention that the wrongs which have been suffered or which are alleged to have been suffered by the individual are the result, not of the failure of the courts to do their duty, but rather the failure of the various executive or administrative authorities to defend the alien under conditions in which international law states that he is entitled to protection.

Of course there is nothing new in what I have said. I know it was not

Professor Stowell's idea that I should take up any individual instances, because taking up individual instances simply wastes the very valuable time of those who are participating at this meeting. I do not know that I can say any more than to reiterate what to my mind appears to be the great necessity, or at least the great advisability (once the instrumentality is provided), of enabling the alien in his capacity as an individual to go before a court which has jurisdiction over wrongs inflicted upon him; a jurisdiction viewed rather from the standard of the wrong perpetrated upon the individual than from the standpoint of the wrong perpetrated upon the state through the individual. But of course at the present time there seems to be no doubt that his only recourse is an application to the state, the opportunity to make which always depends upon the opportunity afforded the state under international practise to attempt to effect an arrangement with the government which is said to be responsible for the wrong.

President HUGHES. I do not wish to interrupt the discussion, but I shall have to leave in a moment to attend a meeting of the Executive Council, and before asking another to take the chair I trust you will permit me to say a word that has been suggested by this interesting interchange of views on what is possibly the most important subject that we have to consider in connection with the codification of international law.

I am glad to observe the emphasis that has been placed upon the existence of an international standard of justice. Of course, there is an international standard of justice. We should have no international law if there were not an international standard of justice. It is very difficult to define it affirmatively. It is more easy to recognize when it is denied than it is affirmatively to establish that in which it consists. In that respect it is very similar to the conception of due process of law to which the speakers have alluded.

We have had in our jurisprudence in this country from the outset the conception of certain fundamental principles of justice and the founders of our government were not careful to define what they meant. They probably thought it was very well not to attempt a definition. They were against any form of tyranny, and it did not make any difference what agency of the government should perpetrate the wrong. But it has been recognized, of course, that in the practical administration of government there must be wide liberty of legislative action, of administrative action under legislative authority, and opportunity to commit judicial errors, if you will, and that it would be impracticable to attempt to resolve on the basis of an application of the Constitution all questions of unwise action or erroneous decisions. So it has come to be recognized that the conception of due process of law embraces only what is fundamental, what really concerns arbitrariness, capriciousness, something that is deemed to be utterly incompatible with the individual right to life, to liberty, to property, and to an opportunity to present one's case or defend one's case.

It seems to me that in the international field we are constantly applying an international standard of justice which will never be completely defined, of course, but which we recognize by degrees, as we agree from time to time upon what constitutes departures from it. Would we not make progress if we approached the matter analytically, distinguishing between substantive rights and procedural rights? For example, we would recognize a denial of justice when there was a refusal to take cognizance of what on the face of the complaint appeared to be an injury, from the viewpoint of the international standard of justice. Then we might also conceive to be a denial of justice a departure from those procedural standards which are necessary to conserve the fundamental principles of fairness.

In testing that, we might say with regard to a judicial tribunal: What are the principles upon which it performs its functions? What are the methods which it adopts in the performance of its functions? What are the conditions of impartiality which attend the performance of its functions? If we found that it proceeded upon a principle which denied relief which seemed to be required by our international standard of justice, on a general consensus of opinion as to what that standard was in the particular case, we could readily say that there was no proper remedy. If, on the other hand, it professed a proper principle, but its methods of administration were such as to give the principle support only in form and deny it in fact, we would say that this constituted a denial of justice. Again, it might profess a principle, and its formal methods might be in accordance with the conception of what was proper, but there might be conditions existing at the time and place which deprived the tribunal of the appropriate impartiality which should exist in the administration of justice, and we could say: Notwithstanding the principle that you accept and profess to apply, notwithstanding the forms of procedure which seem to be correct enough in their reading, you are not giving justice but denying it.

Can we not approach something like a satisfactory exposition if we consider the matter first from the substantive side, as to what sort of injuries should be regarded as the subject of proper remedy, and in the next place what sort of procedure should be adopted?

Then we had a very interesting suggestion with regard to errors committed by judicial tribunals, or wrongs committed by judicial tribunals. As a matter of fact we all suffer, I suppose, at one time or another from errors committed by judicial tribunals in this country. What is an error committed by a judicial tribunal? You never can establish it unless you have a reviewing court. But your right of appeal stops at a certain point. You may be perfectly satisfied that there has been an error committed, but it will never be made known in the way which will give you satisfaction. I suppose that if we had a review of any court, of the highest court in any State or of the supreme court in the nation, that the reviewing court would reverse that court in a considerable number of cases. We might judge

some of the possibilities of reversal by the number of dissenting opinions that are filed in our highest tribunal. But there is a vast difference between errors and wrongs. It may be that the individual suffers quite as much from the case of an error as from the case of a wrong, but there is a certain amount of suffering that we have to put up with in civilized society and we shall never be able to devise any means by which we can save ourselves from the damages that result from the imperfection of human institutions.

That is true of judicial institutions. What we ask is a proper system and a proper administration of that system. We would never admit an alien to complain of a denial of justice, for example, in the State of New York, because the alien, as well as citizens, could not get to the Court of Appeals in a certain case which the intermediate appellate court had decided finally under the constitution and laws of the State. We would never permit an alien to complain of error because the Supreme Court of the United States denied *certiorari* in a case where the Circuit Court of Appeals, according to the opinion of the alien, had been guilty of error. I would not profess to state the principles on which the Supreme Court grants or denies writs of *certiorari*, but I should be greatly surprised if the Supreme Court considered itself as under a duty to correct all errors committed by the Circuit Courts of Appeals. It would be quite sufficient for it to deal with those cases where the alleged error had some public consequence, had some relation to appropriate settlement of the law, as in cases of conflict of decisions, or to the proper maintenance of the system of law, and it would consider that in the ordinary case the citizen or alien, or whoever had invoked the jurisdiction of the lower court, had had his proper day in court if he got to the Circuit Court of Appeals. It would be quite a distinct question, whether or not he had suffered from the decision. That would be because we would recognize a proper system, reasonably administered; and so it seems to me in considering this matter of remedies you have, first, the question of the system of judicial administration, and then you have to consider as a practical matter the atmosphere in which that administration is conducted, the actual conditions, the reasonable degree of impartiality which is associated in the particular case with the administration of justice.

I think that a good deal of progress can be made in attempting to define what is a denial of justice from the viewpoint of an international standard.

It is very interesting to have the point pressed as to the rights of individuals to present claims against states. A state cannot be prosecuted without its consent. Even in the United States, enlightened as we think we are, the United States does not allow itself to be prosecuted except in a limited class of cases, and you have to ask the favor of Congress if you would have recognition of an injury where the United States has not seen fit to permit itself to be sued. Naturally, if the state will not permit itself to be sued, the only way in which a citizen of another state can obtain redress is by going to his own government and asking it to take the matter up with the

other state to see if he cannot get redress. If his own state will not take it up with the other state, of course there is no remedy. The only way of providing a remedy in case the matter is not dealt with as one of favor, or admission of wrong in the particular case, is to have a claims convention for classes of claims so that there may be an arbitral settlement.

Then the suggestion is made that we should have a permanent court to entertain the classes of claims which are dealt with so frequently under claims conventions. Now that would be a great step in advance. It would require, however, a recognition of liability on the part of states which they have been very loath to give. They have been careful in formulating claims conventions. They have had from time to time to consider all the circumstances and often many years have had to elapse before a particular class of claims acquired psychological importance, so that there was a disposition to agree to a particular claims convention which would give individuals an opportunity through their governments to obtain redress. We can make a great deal of progress along these lines, but it must be recognized that the individual will have no chance to resort to a permanent court of claims unless his state is willing to agree that he should have it. The state will probably not agree, as it will be subject to claims made against it, until public opinion has reached the point that the state is willing to be sued, for wrongs which it has committed, both by its own citizens and by others.

Now, with respect to arbitral settlements, the matter comes back, I might say in closing, to what I have always regarded as the chief difficulty in this question of arbitration. It is not with regard to the theory of it. It is not with regard to the desirability of pacific settlement. It is simply a case of lack of confidence in the arbitrators, and the fear that there will be some set-up which will not be satisfactory to the particular country. The apprehension is that there will be some condition under which there will be favoritism, and we all know how difficult it is, not to obtain arbitrators to represent their countries, but to obtain umpires with whom both parties are satisfied. I frankly concede that the difficulty since the World War is more serious than ever because of the supposed prepossession of distinguished men of different nations, as the result of the alignments in that great conflict. When governments strike from your list the names of some of the best men that you can present, what are you going to do? That is solved ultimately, perhaps, as I said the other day, by taking a name out of a hat, and that is very unsatisfactory.

I do not speak in a discouraging way because I think we can make great progress in this matter of dealing with claims, but it ought to be analytically considered with reference to each particular point that raises the difficulty.

Mr. Ralston, will you please take the chair?

(Mr. JACKSON H. RALSTON occupied the chair.)

Chairman RALSTON. I would be glad to recognize somebody for a continuance of this very interesting discussion.

Mr. DENYS P. MYERS. Professor Eagleton asked a question about what one ought to do with respect to anticipating conditions where responsibility might arise. It seems to me that is a question that is well worth attention, and it further seems to me personally that there is only about one type of answer. When we were children we became familiar with the saying, "Don't cry until you are hurt," and I think that is the essential answer. In observation I have been impressed with the fact that it is usually, paradoxically, the big state that does the crying before it is hurt, and that one of the chief reasons it does so, is because its foreign office looks over the situation and says, "Now, there is something brewing and if it should happen there would be a very awkward situation; so let us caution these people, and then the thing won't happen, and we won't have the difficulty to meet." Now that is the kind of thing that a large state will do, practically without thinking. With respect to a smaller state, the smaller state will think twice before it does it and then probably not do it at all.

It seems to me that is the point that is very important in connection with responsibility. It is further illustrated, I think, by certain figures. Some time ago I was interested trying to figure out what was the international value of a man, and I turned to the *Congressional Record*. Every once in a while an alien gets killed in this country and the country to which he belongs thinks that he is worth something and puts in a claim to Congress, and in the course of the next ten years, as an act of grace, Congress votes some money in liquidation of the individual. Usually the market price on the Hill to the east has been about $2,500. A couple of years ago an American consul in Persia was killed and his death was liquidated at something like $60,000. Now most of these aliens that get killed in this country are not consuls, but it does seem to me that there is some discrepancy between the prices that are paid on either side of the border between large states and small states.

Another angle of the liquidation of responsibility. Claims commissions first and last have been rather numerous. Claims, of course, are always somewhat exaggerated, because my tooth always hurts me more than it does you. I have analyzed the claims placed before some half dozen of the claims commissions dating from the Jay Treaty down, and the actual claims awarded, almost without exception, run about ten per cent of the claims originally made. I think that illustrates one of the discrepancies in this field.

Colonel BOUVÉ. With respect to the statement as to the ten per cent, that is, of course, so in certain instances. But as a general rule, when conventions are made calling for the establishment of arbitral tribunals, particularly when they attempt to cover claims for wrongs occurring during a long period of years, such as, we will say, the present claims convention between the United States and Mexico, in that case we have to consider claims arising, for example, from 1868 up to the present time—the statement that in a given claim, or speaking on the average with respect to large num-

bers of claims received, there would be awards in the amount of ten per cent only of the aggregate sum claimed, should be taken with this reservation: that when a situation such as I have portrayed exists with respect to an arbitration such as the General Claims Convention between the United States and Mexico, we must not forget that there are many, many claims where it is practically impossible to present evidence in substantiation of wrongs that have been undoubtedly committed. I think we should bear that in mind in connection with the conclusion that claims are exaggerated by a certain percentage. They are often exaggerated, but, taking it by and large, I should consider that, when we announce the conclusion that ten per cent is usually what is obtained with reference to any particular claim or group of claims which are submitted to any particular commission as a result of such conventions, we should remember that, with respect to large numbers of claims, so much time has elapsed as to make it quite impossible to prove them.

Mr. K. S. CARLSTON. The discussion at the present time has seemed to center more upon questions of law and it has also been advanced that the individual is possessed of certain international rights. The theory of the individual as possessing international rights to my mind has not become an established theory of international law. In any event, under the present system the claims of individuals are pressed by their governments on their behalf, and under those conditions the chief means of presenting claims lies through the foreign office of the particular state in question. With respect then to this presentation of claims, it seems that upon an international difficulty arising it is questions of fact that are first taken into consideration rather than a discussion of the law. It is a question of what are the facts in the particular case.

In this connection, I desire to refer to Professor Hill's paper which was introduced at the outset of the meeting, in which it was advanced from the report of the subcommittee of the League that commissions of inquiry be established. Such an idea seems to me to be one worthy of attention by this Society. The South Omaha riots of 1909 are directly in point. Much of the difficulty in arriving at a settlement of the claims of the several hundred Greek subjects in that case lay in the determination of the facts of the outbreak. The Greek Government had Professor Theodore P. Ion make an investigation, and the State Department also had an official make a report as to the facts, but the two reports were unfortunately not in entire harmony. If a commission of inquiry, such as a representative from each state and possibly a third member, could be appointed in each particular case such a commission would arrive at a sound statement of the facts in that case, and from then on the case might proceed in the discussion of the law applicable to that particular case. Furthermore, in the present discussion of the law, I think it has become quite clear by this time that there are many opposing views as to the principles of responsibility, and under such conditions it

would seem impracticable for an obligatory international court to be established; but the existence of such a commission of inquiry, and the facts presented by it to the respective governments, would tend towards the building up of a wider and more consistent system of law with respect to the responsibility of states.

Chairman RALSTON. Is there any further discussion? If no one else desires to take the floor, we will stand adjourned until 8.30 this evening.

(Whereupon an adjournment was taken until 8.30 o'clock p. m.)

FOURTH SESSION

Friday, April 27, 1928, at 8.30 o'clock p. m.

The President, Hon. CHARLES EVANS HUGHES, took the chair.

President HUGHES. The meeting will now come to order.

We shall consider this evening the subject of Territorial Waters, and the address will be made by Professor Wilson of Harvard University.

TERRITORIAL WATERS

BY GEORGE GRAFTON WILSON

Professor of International Law, Harvard University

To an American contemplating the length of the coast line of the United States, the extent of the territorial waters is a matter of capital importance. The coast line under the jurisdiction of the United States is more than 49,000 miles in length. This includes the coast line of the Atlantic and Pacific mainland and of the islands belonging to the United States. How far seaward from this long line of coast does the jurisdiction of the United States extend and what is the nature of this jurisdiction? While these questions have from time to time been raised, the disappearance of certain forms of maritime life and the appearance of new forms of mercantile activity since the adoption of the eighteenth Amendment to the Constitution have brought the problems of exercise of maritime jurisdiction to renewed public attention.

The words "territorial waters" are open to criticism as being etymologically misleading. Such expressions as "coast waters," "marginal seas," "jurisdictional waters," "maritime domain," "littoral sea," have been proposed as substitutes, and while each has supporters, it may be expedient to retain and use, for the present, the term "territorial waters."

The limits of territorial waters have been the subject of many differences of opinion and of practice. These have varied also as the differing uses of territorial waters have been under consideration.

The controversy in regard to the authority of a state over the waters which border upon its shores has been carried on from ancient times. Some have traced it to the time of the first chapter of Genesis when man was given dominion over the fish of the sea. The doctrines of the freedom of the sea (*mare liberum*) and of the closed sea (*mare clausum*) have been the subjects of many volumes. Even so late as the most recent discussions of limitation of armament, the nature of control over the sea has been of vital importance. Some modern states have assumed the position supported in ancient rules, to the effect that property in the sea was an attribute of the neighboring state. As there might be several states neighboring to the same

maritime area the extent of these rights gave rise to conflicts. The statement was sometimes made, as by the Roman law, that "the use of the sea is free to all" as also of the adjacent coast, but in practice such principles were subjected to many restrictions.

The problem of fishing in marginal waters has long been of major importance. Fish was formerly a main article of food in Europe and fishing remains among matters not yet satisfactorily regulated. With the greater knowledge of the habits and life history of fish the exclusive right of any state even in coast fisheries has properly been questioned.

By Grotius and Selden in the seventeenth century, the use of the sea for commercial purposes was particularly argued. The "battle of books" on rights on the sea was in some respects similar to the "battle of notes" on the same subject during and since the World War.

Bynkershoek in his epoch-marking dissertation *De Dominio Maris*, 1702, reaffirming the old principle that effective occupancy might be a good title, stated that it seemed just to all that the power of the littoral state should extend as far as the force of arms for to that extent the shore can command and has possession. (Cap. II.) In varying forms this statement was approved and became the commonly accepted basis for the idea that coast jurisdiction extends seaward three miles because that was about the range of cannon in the days of Bynkershoek. There were discussions upon the nature of sovereignty as applied to the sea in the sixteenth and seventeenth centuries. The claim that flags of other vessels should always be dipped in salute to certain maritime Powers was frequently made. The argument was made that such terms as the English Channel should be strictly interpreted as implying English title to that body of water. Indeed historical examples may be found for the widest claims to authority over the sea.

The British were not alone in making extreme claims to territorial waters. Other states in the thirteenth century claimed dominion over the seas that washed their coasts. The Viking kings naturally regarded the Northern seas as their own and they were prepared to dispute any other claim. The Norwegian king claimed as territorial waters westward to Iceland and Greenland and northward to the ice, and some of these claims were admitted by foreign states in treaties. Norway and Denmark made treaties with other states in the seventeenth century which recognized the range of vision as the proper limit of territorial waters for neutrality purposes. Later, attempts were made to put this limit in miles. By the decree of 22 February, 1812, the Norwegian territorial waters were limited to "a distance of one ordinary geographical mile from the outermost isles or rocks which are not submerged by the sea." This decree has been reaffirmed, but the geographical mile here mentioned is Norwegian and equivalent to about four miles, or 7420 meters.

With the occupation of newly discovered land area and the increase in the number of states bordering on the sea, particularly upon the Atlantic

Ocean, the need of international agreement upon the principles relating to maritime rights became more evident. There were controversies over fisheries, navigation, and other maritime matters, and to adjust these, conventions and many temporary expedients were adopted. The increasing use of the sea and its products gave rise, however, to new problems. The difficulties in regard to fur seals are typical of one category, while the maintenance of light-houses and aids to navigation furnish another category. The construction of dykes, retaining walls to prevent erosion, etc., has long been permitted, and the right to build breakwaters has rarely been questioned, but now the distinction between artificial and natural extension of land areas is demanded. States have made a distinction between paying for services rendered by a littoral state which provided aids to navigation and payments demanded for the privilege of passing through the adjacent waters. The United States has stood for freedom of navigation but has recognized that payment might be just for services rendered by a littoral state.

Certain conclusions may now be regarded generally as accepted—

(1) The right of a state to exercise authority over a belt of waters along its coast is unlike its right upon the high sea.

(2) The necessity for control varies in degree in different areas and for different purposes.

(3) The claims to control have varied at different periods and in different states and there is no accepted principle at the present time.

(4) The exercise of absolute right of control over fisheries, sanitary and police regulations has been generally conceded within the limit of territorial waters, though this right is in some respects beginning to be questioned.

(5) The right of innocent passage through territorial waters has generally been conceded to foreign vessels.

The application of these conclusions gives rise, however, to many questions which have received widely varying answers. The one most pressing for many years has been, Where does the high sea begin and the territorial waters end? There are still advocates of different limits. The limit of cannon-shot was long and widely supported, but cannon-shot manifestly has been much increased since 1702. Azuni, whose work on maritime law was much used in the early nineteenth century, in translation, said:

> Far as the sovereign can defend his sway,
> Extends his empire o'er the wat'ry way;
> The shot sent thundering to the liquid plain
> Assigns the limits of his just domain.[1]

Some have favored arbitrary limits as four, six, ten, twenty, fifty, one hundred miles from shore. Some have proposed natural standards, as range of vision, depth of water, character of water, degree of saltness, nature of tides, configuration of coast line, the Gulf Stream for the Atlantic Coast line, edge of the ice pack, etc.

[1] Vol. 1, p. 194.

The United States has been among the states making claim to wide jurisdiction. Jefferson was an advocate of the range of vision principle and estimated that range at from 20 to 25 miles, and in a conversation with John Quincy Adams said it would be well "to accustom the nations of Europe to the idea that we should claim it in the future."[2] The United States had, however, in the Neutrality Act of 1794, stated it would cognize acts within "a marine league of the coasts."

Kent would have introduced other difficulties into American maritime jurisdictional claims. He said:

> "Considering the great extent of the line of the American coasts, their writers contend that they have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; nor would it be unreasonable, as they say, to assume, for domestic purposes connected with their safety and welfare, the control of the waters on their coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi.[3]

Kent also refers to several cases. The case of Hubbart *v.* Church before the Supreme Court of the United States in 1804 (2 Cranch, 187), raised the question of liabilities for illicit trade. This case has been cited in support of many other jurisdictional contentions which can scarcely be based upon the opinion. It was admitted as compared with the narrow seas of Europe that in 1804, in the words of the court, "on the coast of South America, seldom frequented by vessels, but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further." It should be emphasized that this decision does not pass solely upon the legality of the seizure of the ship but upon the interpretation of the insurance clause relating to "illicit trade" under Portuguese law. From the cases often cited with Hubbart *v.* Church it may be concluded that municipal laws will be supported by national courts even when international law might not give similar support.

The British case of Queen *v.* Keyn (L. R. (1876) 2 Exch. Div. 63), also often cited, rests upon municipal rather than international law. The importance of this case is that it led to the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict. 73) defining "one marine league of the coast measured from low-water mark" as "within the territorial waters of her Majesty's dominions."

In the case of Mortensen *v.* Peters, 1906 (5 Justiciary Reports, 121), in the Scotch court a judgment was given for £50 against a foreigner for fishing with tackle prohibited by Scottish law five miles from shore in the Moray Firth. The judges in this case expressed no doubt as to their competence to

[2] Memoirs, J. Q. Adams, p. 375.

[3] Commentary on International Law, Abdy's edition, 112.

render such a decision under domestic legislation though admitting there might be a possibility of local legislation that would exceed the bounds which international law might set. This seems to have been the fact in this instance as, following diplomatic representations, the fine of £50 was remitted and in 1909 an attempt was made to limit use of tackle injurious to the fisheries by the Trawling in Prohibited Areas Prevention Act (9 Ed. 7, C. 8), which prohibited the marketing in British jurisdiction of fish thus taken. The cases leave doubt as to the nature of authority at considerable distances from the coast.

The trend may be said to have been toward the acceptance of three marine miles as the limit of the jurisdiction of the adjacent state. This trend has in part been due to the growing recognition that the right to exercise jurisdiction would imply a correlative duty and states are more reluctant to take on duties than rights. A British court in 1860 said:

> There can be no possible doubt that the water below low-water mark is part of the high seas. But it is equally beyond question that for certain purposes every country may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shores. Whether this limit was determined with reference to the supposed range of cannon, on the principle that the jurisdiction is measured by the power of enforcing it, is not material; for it is clear, at any rate, that it extends to the distance of three miles, and that many instances may be given of the exercise of such jurisdiction by various nations.[4]

In 1923 the Supreme Court of the United States in the case of Cunard Steamship Co. *v.* Mellon said:

> It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles. (262 U. S. 100.)

The treaty of January 23, 1924, between the United States and Great Britain in regard to the prevention of smuggling of intoxicating liquors, states in Article I:

> The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters. (41 Stat. 1761.)

Other conventions of the United States on the same subject contain the same article, as with Germany, May 19, 1924 (43 Stat. 1915); Panama, June 6, 1924 (43 Stat. 1875); Netherlands, August 21, 1924 (44 Stat. 2013); Cuba, March 4, 1926 (44 Stat. 2395).

[4] Screw Collier Co. *v.* Schurmans (1860), 1 Johnson and H. Ch. 193.

On the other hand, several conventions of the United States do not specify the number of miles included within the territorial waters. The first article of these conventions reads as follows:

> The High Contracting Parties respectively retain their rights and claims without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction. (Sweden, May 22, 1924, 43 Stat. 1830; Norway, May 24, 1924, 43 Stat. 1772; Denmark, May 29, 1924, 43 Stat. 1809; Italy, June 3, 1924; Spain, May 3, 1926, 44 Stat. 2465.)

Manifestly states concluding such treaties as these last named have not committed themselves to three marine miles as "the proper limits of territorial waters."

The three-mile limit approved by the United States, France, Great Britain, Germany, the Netherlands, and some other states, has given rise to such controversy as might easily be visualized when a state maintaining a three-mile limit is adjacent to a state maintaining a more extended limit. A case of this kind occurred in the matter of authority over fisheries in 1909 when in adjoining waters France maintained its authority outward three miles and Spain six miles. The request of France that its fishing vessels might freely fish in the zone between three and six miles seaward from the coast of Spain, as Spanish vessels were permitted to do off the coast of France, was refused by Spain. On the other hand, the North Sea Fisheries Convention provided that exclusive rights to fisheries should extend three miles from the low watermark. Denmark was a party to this treaty, while maintaining with other Scandinavian states as a general rule the four-mile limit. No agreement could be reached as to the accepted limits of territorial waters at the Hague Conferences of 1899 and 1907. During the World War some states made extreme claims as to the extent of their territorial waters, while Norway waived for a time her claim to four miles and accepted the three-mile limit. The claims as to the limits of territorial waters have not merely varied with the country making the claim but with the time and object of the claim.

In the early part of the century the United States made claims in regard to the seal fisheries in the South Atlantic exactly opposed to those made on the same subject in the North Pacific at the end of the century. In 1893 the tribunal of arbitration considering the Behring Sea seal fisheries in the award said "the United States has not any right of property in the fur seals frequenting the islands of the United States in the Behring Sea, when such seals are found outside the ordinary three mile limit," and provided for regulations for the preservation of the seals even in the high seas. Other conventions for the preservation of the fauna of the sea have been made. The convention between the United States and Great Britain of March 2, 1923, provides for the preservation of the halibut fisheries off the west coast of the United States and Canada, both in territorial waters, and on the high seas. Other conventions provide for the extension of jurisdiction of the

adjacent state beyond the three-mile limit for purposes of customs, police and sanitary protection.

In time of war the claim to jurisdiction on the part of the belligerents has varied according to the neighborhood of military and naval bases, strategic areas, etc. During the World War proclamations based upon the claim of retaliation extended the danger zones far beyond any legal justification. The neutrals, realizing that rights in time of war carry corresponding obligations, have generally extended jurisdiction three marine miles only.

Other problems arose when the territorial claims of littoral states had regard to bays. The extended arguments in the North Atlantic Fisheries Arbitration in 1910 to prove that in the Convention of 1818, Article I, the negotiators understood that "a bay was a bay" is an example of such a claim. The tribunal decided that the territorial waters should extend seaward three marine miles "from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay." The tribunal also recommended that the parties determine the limits by a line drawn seaward from a line across the bay where it first narrows to a width of ten miles. There has been much discussion of this principle, and except for bays which by long usage, as the Chesapeake Bay[5] are regarded as territorial, the principle may be said to be increasingly supported, as is evident from decisions, legislation, proclamations, etc.

Other controversies have arisen in regard to the extent of territorial waters. Shall such waters be measured from the mainland or from outlying shoals, banks, rocks, etc. There has been a growing opinion favorable to the measurement of three miles from rocks, reefs, or land exposed at low-tide. This has excellent arguments in its support. The problem becomes more difficult when an archipelago or group of islands is under consideration. The question is also raised as to whether similar jurisdictional rights inhere when a state uses a reef always submerged upon which to construct a light-house, aërial tower, or other structure, and the opinion seems to be that these should be regarded as in the same legal status with vessels under the national flag.

The increasing use of the sea and the products of the sea has made it essential that states give much greater attention to the control not merely of territorial waters but also of the high sea. The uncontrolled use of the products of the sea, such as whales and other fauna and the flora of the sea, may destroy essentials to the well-being of mankind, and it may soon be recognized that even in territorial waters the well-being of all may be dominant over the earlier accepted right of the littoral state, when within the littoral state injury is done to fauna frequenting the high sea and other littoral waters.

The extension of protectorates, suzerainties, leased territories, mandates and other forms of qualified jurisdiction, has made it of doubtful accuracy to

[5] Stetson *v.* the United States, 4 Moore Int. Arbitrations, 4341.

say that the state exercising authority on the land has sovereignty over the adjacent waters. It is clear, however, that the authority on the land carries with it jurisdiction in the littoral sea unless provided to the contrary. The use of the word "sovereignty" to indicate the nature of relationship to the marginal sea is not in all respects accurate. Indeed the Geneva Convention and Statute on the International Régime of Maritime Ports, December 9, 1923, and in force since July 26, 1926 [6] uses the expression "sovereignty or authority."

The old idea of throwing oil on the waters had in view the calming of troubled waves. Now pouring oil on the waters may cause an international controversy. The oil thrown on the waters has become a menace not merely to fishing industries but in some sections to water fowl and other life more or less dependent upon the sea. Fire hazards have in some places been increased. Bathing beaches have changed in character. This practice of throwing oil into waters has led to much legislation relating to the discharge of oil in territorial waters, of which the Bermuda Act of 6 January, 1921, is an example. This act prescribes a penalty of £100 or six months' imprisonment for such misuse of its harbors and foreshores. To discover where oil may come from is necessary if punishment is to be inflicted. The source is not easy to discover. It may even come from beyond the three-mile limit. The present tendency is to arrange by international agreement for the suppression of this nuisance even outside territorial waters.

The course of development of control over territorial waters has shown on the part of maritime Powers a willingness to recognize the right of an adjacent state to exercise jurisdiction varying according to the purpose for which it is exercised. Within inland waters, in enclosed waters where the entrance is narrow, and in harbors and ports, the exercise of exclusive jurisdiction has been generally admitted. There seems to be no strong objection by foreign states to the filling of the Zuider Zee by the Netherlands, and the United States and Canada exercise exclusive jurisdiction over the Great Lakes through which the international boundary runs. On the other hand, the right of innocent passage for foreign vessels along the coast is generally recognized while fishing in the same waters might be denied.

These and many other circumstances led the League of Nations Committee of Experts for the Progressive Codification of International Law to decide that one of the first topics which should receive attention should be territorial waters. A schedule of points drawn up by a preparatory committee for submission to governments and issued February 15, 1928, contains fifteen topics relating to territorial waters. Many of these topics are closely connected with other matters such as the nature of criminal jurisdiction, nationality, protection, etc. New problems arise in consequence of development of new means of transportation and communication. It may be asked whether a state may require a submarine when within its territorial

[6] League of Nations Official Journal, 1927, p. 1514.

waters to navigate upon the surface. The reply has thus far been in the affirmative, but this is for reasons of safety, and it may be that with improved devices greater safety may be secured by under water navigation. Hydroplanes introduce other problems. The migratory habits of fish and their apparent preferences for living in different places at different stages of their existence may throw doubt as to what the inhabitants of the several jurisdictional areas may do as regards these fish at each stage. These and similar questions are under consideration by commissions.

Indications seem to point to a maintenance of the three-mile limit for neutrality and war relationships. For the time of peace the three-mile belt for marginal sea jurisdiction is receiving more general recognition for ordinary purposes. There is, however, no entire accord as to the exact length of a geographic mile. Wider limits are generally recognized for customs, sanitary and police purposes. The safety of the state may lead to wide extension of state authority for special purposes. The well-being of mankind in general may later restrict or regulate acts within the territorial waters as it may on the high sea. It is becoming evident on the sea as on land that the greatest good of the individual is closely related to that of all and that national and international law must, particularly as relates to maritime jurisdiction, rest upon the broadest principles embodied in the recognition of the rights of other individuals and nations.

President HUGHES. The subject is now open for discussion.

Mr. FRANK E. HINCKLEY. The lecturer honored the Pacific Coast with a visit in the past year and we should have been glad to have him remain among us for observation of interesting developments in the law of marginal seas. The coastal fisheries have again raised interesting questions of the westward boundary locations and of national and state jurisdictions as against private claims, including fishing by aliens. The two *Peralta* cases appear rightly decided, but upon questionable reasoning.

The term "territorial waters" may possibly be improved upon. It has but little more to justify it than its strange converse "maritime lands." The term "high seas" in international law has a very different meaning as a term in admiralty. The term "maritime jurisdiction" is being somewhat loosely used in connection with "territorial waters." There is more precision of terms in the admiralty courts than in the international law discussions; for example "arrival in port" of a merchant ship is precise as to a surveyed line and the instant of passing that line, whereas no such precision has yet come into international law.

The geographical element as to territorial waters may have been given too great attention as compared with the element of right and obligation of protection from the coast. Why give so much thought to the width of the marginal seas while the speed and power of airplanes and radios extends control from the shore over almost the widest expanses of the ocean? The

open sea is being actually appropriated. The North Atlantic has routes for eastward and westward going ships, summer routes and winter routes, quite as definitely bounded as if they were surveyed on the land. The Grotius-Selden controversy is far out of date. What of submarine cables? What of the herring fisheries, the conservation of halibut fisheries, the Alaska sealing agreements, the imminent extinction of whale?

The newer conceptions of rights at sea must prevail. The ocean expanses are no longer like great vacuums, defying control. The governments of leading Powers are disposed favorably toward coöperation. The problems of boundaries on the ocean fronts are to be subordinated to the coöperative appropriation and control of the sea.

Professor PHILIP C. JESSUP. In spite of the remarks just made, which, it seems to me, indicate perhaps a prophecy of the future, I believe at the present time that our subjects have been oriented somewhat in connection with codification projects. I believe that probably the most intense problem that will come up in connection with territorial waters and the codifying of the rules relating thereto, will be the question of the exact nature of the rights which are exercised within and without the three-mile belt. The greatest difficulty will be found in connection with defining or admitting the existence of any rights on the high seas outside the three-mile limit. Personally, it seems to me, judging from the replies which various governments made to the questionnaire sent out by the League, that there is not going to be a great deal of difficulty in finding a concurrence on the three-mile limit as a starting point, but that the trouble will come in either admitting or defining such rights as may exist outside those limits as to sanitation, customs, quarantine and similar matters.

I think the distinction has perhaps been brought out, as far as the United States is concerned, more clearly by our present chairman than by any other person when, in referring to the question of the enforcement of our prohibition laws, he pointed out that the United States had always been an insistent supporter of the three-mile limit, but that that fact did not necessarily imply that the United States had no rights more than three miles from shore, and he proceeded to suggest as examples of such rights the right of hot pursuit and various cases of a relation between acts of the vessel and acts on the shore.

Great Britian now seems to deny the existence of such rights. I have difficulty in seeing how the present British position can be sustained in an international conference, since you all recall that for over one hundred years Great Britain had upon her statute books what originally gave us the name of "hovering acts," that is, acts which provided for the enforcement of customs and other laws within rather wide areas off the British coasts. In 1876 Great Britain passed the Customs Consolidation Act by which those measures were made applicable to foreign vessels only within the three-mile limit. There is a technical question in law as to whether it is really appli-

cable to foreign vessels, but at least it has not been so applied. In the last few years the British Government has taken the position that the Act of 1876 brought British legislation into conformity with international law, and she has put herself in a rather strong tactical position because she is admitting that for about one hundred years the statutes were contrary to international law. Judging from this attitude, there will be a strong objection on the part of Great Britain to admitting in any code any right outside of the three-mile limit. It is an interesting problem from the general point of view of international law as to the position of a state which for a period of a hundred years was acting upon one principle and then at the end of that time frankly admits that its position was illegal and asserts that its present position is expressive of the correct rule of international law.

Admiral WILLIAM L. RODGERS. I would like to draw attention to the rule of the road at sea as affected by the rule of territorial waters. The rule of the road at sea changes from the international rule, when passing into inland territory; then we follow the rule of the United States, which differs in some particulars. In 1895 the President made a proclamation by which he included in the inland waters for the purposes of the rule of the road at sea governing collisions, etc., all inside the line reaching along the outside islands of the United States, so that the rule of the road at sea changes some nine or ten miles offshore. The most marked case which I have looked at on the map is the case of the coast of Maine between Matinicus and Mount Desert Rock, thirty-three miles apart, and the middle of the line is nine miles from the nearest island. I am orally told that the Coast Guard uses that line when chasing rum runners, and they hold that a capture may be made twelve miles outside the line joining those two islands. This is a very great extension of the three-mile territorial rule.

There is another point I would like to speak of that has been alluded to already. The rule as to territorial waters and the rule for territorial air ought to be the same for each. I was at The Hague several years ago in attendance at an international conference where the Italian delegates wished to extend the rule of territorial air far beyond the admitted rule on territorial waters, so that a flying boat would be able to change its status from minute to minute by rising into the air and falling again into the water. Whatever the rule, it should be the same both for the air and for the water.

Professor PHILIP M. BROWN. I have been waiting for others to fill in the gap, but this subject has been of the utmost interest to me for a number of years. I find that the more you study this subject the more you find yourself "at sea." The rules that we thought were so clear we find are not so clear. Professor Wilson, in the lectures he gave at The Hague, marshalled the authorities on the three-mile limit and out of thirty-three authorities he found only seven who favored the three-mile limit. He also considered the coast line of Europe and demonstrated that by coast mileage the mass of the European nations were far from agreement on the subject of the three-mile

limit. I think that we ought to be clear on this point, that it started, as Professor Wilson has brought out, in an attempt to initiate a very simple principle, the principle of control from the land, what you could effectively as a territorial sovereign exercise dominion over, and by some curious development, perhaps the love of rigidity, of limiting things, it has become crystallized into the three-mile limit. In our own history it will be remembered that Washington in his declaration of neutrality was perhaps the first to really put the three-mile limit into a formal statement, and Jefferson expressly said that he only indicated the three-mile limit as a minimum; that we had the right to a larger jurisdiction, but at present we would not claim it.

That question of the three-mile limit seems to me of relative unimportance compared with the other topic to which Professor Jessup has alluded, which has become now really of moment because of the fact that there has been proposed the recognition of the rights of nations to perform certain acts of the nature of protection outside of the three-mile limit or outside of the zone which may be agreed upon as constituting territorial waters. Now, that idea has been taken up extensively by a great many nations and is going to be earnestly debated. I would like to recall the fact that four or five years ago in a meeting of the Society I ventured to state that it would seem entirely reasonable to recognize the sovereign rights of the nation to perform certain acts of the nature of self-protection outside of its territorial waters. In the Behring Sea Arbitration, Sir Charles Russell, who represented England, made the statement that no one would really deny to any nation the right under special circumstances to take measures of protection outside its territorial waters. I believe he was then discussing the habits of the seal. You remember that the United States in its argument advanced the extraordinary claim that the seal was a good deal like a cow going out to pasture and returning at night, and therefore the seals inhabiting the American islands were American seals!

I think it important to note what Professor Wilson has said, that we are obviously approaching the inexorable and imperative necessity of an international agreement for the protection of the fauna of the sea. Russell, it seems to me, made a sensible admission when he made his statement. What is it based on? It would appear that he is pointing to a right other than a right of territorial jurisdiction. Let us approach it from the point of view of a belligerent right. We know that in war time a belligerent has a right to approach neutral vessels on the high seas, to search them and seize them, and in some cases, to sink them. What is that right? Is it a right of jurisdiction? Obviously not, for the high seas are not subject to jurisdiction by any Powers. They are exercising the right of self-protection in respect to this specific vessel.

Take the case of the *Virginius*, when Spain felt warranted in preventing the approach of a filibustering expedition long before it got anywhere near the three-mile limit. There were certain acts connected with that seizure

which were of course reprobated, and justly reprobated by other nations; but it was generally conceded that Spain had the right to take preventive measures long before the vessel was able to get within the three-mile limit during a fog or at a time when it might have escaped. This clearly concerned the right of a nation to protect itself. If we have a question of the landing of dynamite, or explosives, or of undesirable immigrants, or the landing of rum, it would seem as though it were only a matter of degree, that the principle remains the same, the right of a nation to protect itself against intended violations of its fundamental rights.

So then we are faced with this difficulty, the difficulty of trying to define what may be a reasonable proximity to the coast. It is extremely difficult, if not impossible, to fix any limit to the exercise of a right of a nation to self-defense. I, for one, would welcome the recognition of a fundamental right which, as Mr. Jessup has called attention to, our chairman in his very difficult negotiations over this subject safeguarded in the statement that there were other rights outside of the three-mile limit which this nation might claim.

President HUGHES. Are there any others who desire to speak on this subject?

Professor QUINCY WRIGHT. I presume that the study of territorial waters should include not only the possible extensions of jurisdiction beyond the three-mile limit, but also the possible subtractions from jurisdiction within the three-mile limit. We have not given any attention to that subject. Of course, the immunities of public vessels would be well understood, but the possible immunities of private vessels might also be considered. The opinions of the courts of various countries greatly differ both as to the practice and as to the rights on this subject. It is the usual practice to recognize certain immunities as belonging to private vessels. I think probably that is the universal practice, but there seems to be a difference of opinion as to whether those exemptions are given as a matter of legal right or merely as a matter of comity and convenience. The case of Cunard Line *v.* Mellon has been referred to, and this case brought some sad reflections to my mind because I had the misfortune to publish an article anticipating the court on some of the points at issue. I took the position that foreign vessels carrying rum under lock and key as part of their ship's stores should be entitled to enter American ports without being considered as violating the American prohibition law, and I also took the position that the American revenue cutter service should be entitled to act for protective purposes, as Professor Brown suggests, somewhat beyond the three-mile limit in order to enforce the American law if it was clearly the intention of the vessel acted against to violate it. In both of these contentions I believe I fell afoul of the Supreme Court, but I am still unconvinced.

It seems to me that it would be much more in accordance with the condition of affairs which actually exists in the world if one did not attempt

to draw the three-mile limit or any other particular geographical line as too rigid a boundary. There doubtless must be some line, whether you make it the high water mark or the low water mark or three miles or four miles, some line which marks the change from a state's territory to the high seas, but it seems to me that there is a certain shading on both sides of this line, that there are conditions which ought to justify the state going somewhat beyond, whether for protective purposes or for the enforcement of its law, where there is a contact established with the coast, and that within that line there should be some limitation of its jurisdiction to interfere with foreign vessels that are carrying on their business in a normal way. It is extremely embarrassing, for instance, for an officer on a French merchant vessel, whose law requires him to serve a certain ration of wine to his crew, to be obliged by American law to dump all his wine overboard before he enters American waters. Of course those matters can be covered by treaty, and in many cases they have been, but it would seem reasonable to recognize a general principle of international law which would take care of the situation.

President HUGHES. If no one else desires to speak, we will ask Professor Wilson to close the discussion.

Professor WILSON. I would venture to ask you to say something about a subject with which you have been so closely connected and upon which you have done so much work, Mr. President.

President HUGHES. My problem was a very practical one, and it did involve, as has been suggested, some rather difficult negotiations. It seemed to be important that there should be a fair exchange of views in the light of serious exigencies in order that our government, on the one hand, should not be altogether inhospitable with regard to the foreign ships under conditions in which we suffered no harm, and that, on the other hand, we should have a reasonable opportunity to enforce our laws.

I shall not attempt to speak of the result in detail. What has just been said, it seems to me, is quite pertinent, that there must be some place where the territorial jurisdiction stops. When I say "territorial jurisdiction" I mean the normal operation of the local laws as local laws. It would be quite impossible as a practical matter, I suppose, to exercise the rights of jurisdiction exclusively with reference to the high water mark or the low water mark and it is important that there should be some understanding, some consensus of views with regard to the extent to which the laws of a state extend simply by virtue of their being the laws of the state, without regard to the question whether they are convenient or not in relation to those who are normally outside the state and who enter the state only with the consent of the state and under the conditions which the state deems proper for that entry.

All of our regulations in maintaining our local jurisdiction are deemed to be reasonable for our internal protection and depend upon the recognition of a boundary line for that purpose. So, I suppose, whether it is proper to

have a three-mile limit or some other limit, it is important that there should be a limit, and it seems to me that we should draw the distinction between an exercise of jurisdiction in the normal way with respect to local laws by virtue of the authority of the state over its territory and a particular exercise of authority with reference to questions that arise on the sea beyond the limit of jurisdiction. When we have established that local jurisdiction goes to a certain point, then it may be a logical requirement that all who come within the jurisdiction shall subscribe to the conditions that the state imposes, and if the state imposes unreasonable conditions, it will meet those who are confronted by those conditions, and negotiations will naturally result to see if the rules that are deemed to be unreasonable should not be displaced by others.

There are other problems which, as Professor Brown has very well said, relate to protection. The question is not where the State of New York ends, or where the United States ends, with reference to the existence of Federal control as such, or the existence of State control as such when it does not come into conflict with Federal control, but what the nation should enjoy as a right for its self-protection.

Now, it seems that when you leave whatever boundary is fixed and go upon the high seas, you leave the particular territorial jurisdiction of the state and go outside the state and then whatever rights you have depend upon international law. You have gone beyond local law. You are no longer under municipal law—I am now speaking as to your relation to other states and not of any relation that may continue to your own state—and until you enter within the territorial jurisdiction of another state you come under international law. I suppose that is a field where there may be an advantageous extension of mutual rights by a proper convention. I suppose as a matter of international legislation promoted through the proposed conference, it would be useful to have an extension of the right of protection in certain cases.

Then, there may be a third category. It has relation to those acts immediately outside the boundary of the state which directly menace its comfort, its convenience and the proper enforcement of its laws, and in that sense you may say it is necessary to have protective measures. That is somewhat different from the situation on the high seas where the need of protection may be rarer, where the particular sort of protection indeed may be of a different quality. When there is injurious action close to the boundary of the admitted territorial jurisdiction of a state and for the purpose of transgressing its laws, it would seem to be clear that it can be regarded as an invasion of the rights of the state.

There are several illustrations of that. One was recognized by Lord Salisbury in a case where a vessel lying outside connected with the shore by its own boats. We had a debate with the British Government with regard to a class of cases where a vessel intending apparently to violate the laws of

the port lay outside with the purpose of unloading its cargo within the port contrary to the rules of the port. It is not necessary to attempt to make an exhaustive statement of all the cases that may require the recognition of the right of a state to protect itself against encroachment upon its authority by acts committed on the other side of the boundary line, wherever that may be drawn, and to take whatever measures may be necessary for its protection against such a wrongful invasion of its territory, for that is what it amounts to in substance, when communication is established with the port or with the shore for the purpose of creating conditions upon land contrary to the laws of the state having jurisdiction over that territory.

Those are the three classes of cases which it seems to me we shall have to deal with. We must have a line for our territorial jurisdiction in the sense that our laws go there, and if anybody comes within that line he comes with our consent and is subject to our laws; then we have an adjacent area which cannot properly be used for the purpose of invading our territory; and then we have the broader question of what may properly be done upon the high seas where we have to consider the protection of fish life and various other questions which seem to require international conventions.

We will now adjourn until tomorrow morning at 10 o'clock, when discussion may be continued if it is so desired, and we shall then have our business meeting and the election of officers for the ensuing year.

(Whereupon an adjournment was had until Saturday, April 28, 1928, at 10 o'clock a. m.)

FIFTH SESSION

Saturday, April 28, 1928, at 10 o'clock a. m.

The President, Hon. CHARLES EVANS HUGHES, took the chair.

President HUGHES. Gentlemen, we have an opportunity this morning to resume the discussion on these subjects which have been presented, the subject of nationality, responsibility of states for damage done to aliens, and territorial waters.

There may be some who have not been able to take part in the discussions at an earlier time, from whom I am sure we should be very glad to hear.

Professor EDWIN M. BORCHARD. It is not quite fair for me, perhaps, to speak to the Society now on the responsibility of states in view of the fact that I had to be away from the discussion yesterday, but I would be glad if the members of the Society would give me the benefit of their views on certain problems that have arisen in connection with the proposed codification of the rules governing the international responsibility of states. There are several problems that have troubled me as *rapporteur*, and I would like to submit them to you and perhaps ask for your opinion on the validity of my tentative views.

The subject is not so difficult, I believe, if you have a theory upon which to start. There is a lot of difference among the cases and among the authorities that have written on this subject as to whether a major official and a minor official are equally agents of the state so as to make the state immediately responsible for their affirmative acts or negative negligent omissions. As you know, a great many cases hold that when a minor official commits an injury against an alien, before there is any inception of international responsibility you must prosecute the minor official, if the local law permits. Recent codifiers in Europe regard this as an error in theory. In studying the French law and the German law which have been dealing with these subjects in municipal law for the last one hundred years or more, I find that they make no distinction whatever in the rank of the agents of the state and maintain that whether a minor policeman or a major official of the state injures an alien, in both cases local state responsibility has been incurred. Is this true internationally? Some cases and writers consider that it is, without maintaining that diplomatic interposition has become proper. They merely mean that there has been an international tort, if you will permit that term, from the moment of the injury. Others maintain that there has been no *international* tort, until a failure of local redress is established.

Now, whenever a state permits itself to be sued so that the state by its local machinery is in a position to make good the official delinquency, certainly the alien should be required to resort to that relief and his case should

not be made a subject of international interposition. I think all are agreed on that, whichever theory they adopt. But suppose the state does not permit itself to be sued for official torts, but the officer alone is suable. Can the state escape international responsibility to the alien's state by opening its courts to redress against the officer? Is it the failure of redress, or better, the denial of justice, which is the essence of the international offense, or is it the original official tort or crime? On that, the two schools of thought differ.

If the theory is correct that there is an international delinquency the moment the official of the state inflicts an injury, but that diplomatic interposition is not proper until the local state has first been given an opportunity to make good that delinquency, we might ask what is meant by the opportunity of the local state to make good? Does that mean merely prosecuting the official, the policeman who has assaulted an alien? This school of theory would answer No. That is a matter for the state to straighten out with its own officials; it means compensation in so far as we can apprehend that term, reparation to the alien for his injury. Now in many states, notably France and Germany, you can sue the state and get your full relief. Where you can do that, certainly there should be no diplomatic interposition. All that the alien can ask is that the local state shall make good the delinquency, as it would in the case of a citizen. But, answers the other school of which the Tunstall case (Moore's Digest, VI, 662) is an illustration, if the alien is given the benefit of the local law, like the citizen, and is permitted to sue the officer, the state not being suable in tort, wherein lies any offense to the alien's state internationally? Not until you establish a denial of justice, which indeed is more serious than a mere failure of redress, have you laid the foundation for an international claim.

There is practically no difference of opinion where a private individual has assaulted an alien. There the state is under no circumstances responsible for that assault, but only becomes liable where the state machinery itself has failed in enabling the wrongdoing individual either to be prosecuted criminally or be sued civilly. Then you must show that in connection with those legal remedies there has been a technical denial of justice, not merely a failure to make good the injury, because the state is not a guarantor of the safety of all aliens against assaults by private individuals. The first school mentioned, which I think would include the Institute of International Law, makes a great distinction between cases where an official of the state, either major or minor, commits the injury and where a private individual has done it.

Then another problem has arisen. We speak somewhat glibly about the state being responsible where it has failed to prevent an injury or has failed to punish. Now the moment you test that general statement against the cases you find yourself in deep water. Let me illustrate such a case: A jailer who has in his jail a private delinquent, a private individual who has assaulted an alien, lets him out of jail. We call that a failure to punish,

and on the theory that the state has condoned the act we assess damages against it. It is a complicated question on the measure of damages whether the state is now responsible for the original injury done by a private individual. For there has only been a subsequent failure to punish. Now how is the alien injured by that failure subsequently to punish? He is disappointed in his human expectations, in his desire that the wrongdoer be punished, perhaps in his desire for revenge, and I am inclined to think that that is the extent of his injury. He has been injured in his moral feeling that the person who has injured him ought to be punished by the state and the state is assessed with responsibility because it has not done so, on the theory that by not doing so it has in some measure condoned the original wrongful act. Now, let us assume that the state punishes that jailer most severely. Is the state still responsible to that alien because the jailer let the guilty individual escape? (I assume good faith in seeking again to apprehend the original offender.) That is a practical and not merely a theoretical question, because it has come up in several cases before the Mexican Claims Commission. My tentative answer would be that the state is not responsible. It has done everything that it could to indicate that there is no condonation by the state. It is quite different, however, it seems to me, where the official has failed to prevent the injury, for there I think it is hard to escape the conclusion that the state is responsible for the injury because its own agent has failed to prevent it.

Another question has come up. States enter into contractual relations with aliens, for example, private concession-contracts. The state breaches the contract. We are familiar with the theory that the state does not become internationally liable, that there can be no diplomatic interposition until the alien has prosecuted his remedy in the local courts, and established a denial of justice. That has led one school to say that there is no international delinquency by mere breach of contract, that the international delinquency does not begin until there has been a denial of justice in the local courts in the prosecution of your rights under the contract. Others claim that this is not the correct theory. They maintain that a breach of contract is as much a wrong as a tort, that there is an international delinquency the moment the breach of the alien's contract has occurred, whether it be a tort or a breach of contract, provided an official of the state has done it. But they do not mean to imply that the international artillery shall be brought up to prosecute that breach of contract. They insist that there should be a complete exhaustion of local remedies and the establishment of an inability to be made whole by the local machinery—not necessarily a denial of justice. The moment local redress proves inadequate, they assert that the case is ripe for submission to an international tribunal, but that the injury has occurred from the moment of the repudiation or breach of the contract. These conflicting theories have somewhat troubled our committee.

Another question involves the matter of procedure. Shall we put

into the draft a provision that an international pecuniary claim, which practically always presents exclusively a legal question, shall, if diplomacy fails, be submitted to an international forum. I entertain the view that it *should* be submitted and that the code should so provide, because if we cannot do that I have great hesitation in believing that anything obligatory will ever be submitted. Some purpose is served by singling out this type of dispute and keeping it within the legal field, so far as human institutions can do so. It can and should be lifted out of the political arena. For that reason, it is proposed that the code provide for obligatory submission of disputes, because the rules themselves depend upon the meaning of such vague phrases and standards as "due process of law," "due care," "due diligence." These words are subject to interpretation. Every country as a rule will agree upon the general principle. Mexico did not have the slightest difference with the United States as to her opposition to "confiscation." We were in perfect accord on the principle, but the difficulty lay in the fact that we interpreted the word somewhat differently.

In connection with a code which is made up so largely of such terms, expressing standards, as "due diligence" and "due care," which are incapable of exact definition, it is all the more necessary that unilateral interpretation by each litigating country be not permitted to become the exclusive or the political interpretation upon which diplomatic action may be taken. The difficulty is that when they do maintain that position they take political action and deem themselves entirely righteous. They decline to conceive ordinarily of the possibility of another interpretation of the term. Hence these are distinctly cases that should be submitted to the international forum. It would have the advantage of diminishing the distinction in diplomatic protection that now often exists between a British contractor in Buenos Aires who builds a bridge and a Mexican contractor who builds a bridge. There should be no difference in the legal determination of the rights of the respective contractors by virtue of the nationality they possess. I am sure there is some difference in practice now; it is more valuable to be a stockholder in a British company that has a contract than in a Mexican company that has such contract. I think there is some experience to justify that conclusion.

Just one final word. I have long believed that the day would come when the citizens of a nation as a whole would no longer be willing diplomatically to support every private citizen or corporation, a concessionaire perhaps, who goes abroad and undertakes a more or less useful and desirable enterprise in a foreign country. Nevertheless, we cannot ask that the existing practice be modified unless we can supply something as good or better. Inasmuch as these questions are purely legal in their character, certainly in their inception, before they become encumbered by the political recrimination which often takes place, it would be proper that the private individual who goes to a foreign country and makes a contract which is broken or is injured

tortiously shall, if the local courts and diplomatic procedure cannot give him satisfaction, be permitted, encouraged and perhaps aided to appear before an international court, call it an international court of claims, if you will, and to press his claim judicially, perhaps with the aid of his own country. That private claim ought not to become the subject of vigorous diplomatic or armed support by his own country, unless there has been some direct injury to the nation.

There is more and more public opinion in this country and other countries that the people should not become involved in these purely private legal disputes, and I think that the only way of safely meeting that protest and at the same time protecting the rights of the individual, whose rights I am not anxious to sacrifice, would be an orderly method of submitting his disputes, in case there is no local settlement or in case there is no diplomatic settlement, to an international forum automatically, that is, by request of either the plaintiff or defendant country. That is not so radical, in my judgment, because we are already familiar with conventions which have authorized suits by private individuals against foreign countries before international courts.

I would be glad if the members of the Society would think about these problems that I have raised and, if they do not feel free to discuss them here, if they would be good enough to write me their views on these subjects, for I am suggesting theories and opinions, not as final conclusions in any sense, but as thoughts that have occurred to me after working on this matter a good many years and being charged now with the responsibility for preparing a draft code on the subject.

Professor JAMES W. GARNER. I merely want to ask Professor Borchard a question. He makes a sharp distinction between injuries resulting from acts committed by public officials and agents, on the one hand, and acts committed by private individuals on the other. The distinction, in my humble opinion, is perfectly sound and logical and I share entirely his conclusions in regard to the distinction. The question I wish to ask is whether he would make a distinction between injuries resulting from acts committed by public officials acting within the scope of their authority, and acts committed by individuals acting entirely outside of their authority, that is, where an act is what the French call a *faute personel*. We have had some cases recently involving this question, cases where the injury was committed by a policeman off duty or by a soldier when in his civilian clothes. Now I believe Mr. Guerrero in his report maintains the proposition that there is no state liability where the act is committed by an official acting outside his authority. What is your opinion, Professor Borchard, of that distinction?

Professor BORCHARD. Professor Garner brings up a fundamental legal question. Mr. Guerrero does take the view, I believe, that whenever the official acts outside of his authority, and by that he means violates his legal

duty, he is no longer a state agent, and the result is that whenever he commits a wrongful act he acts on his own account and not for the state. That would be a rather convenient theory to disclaim practically all state responsibility, that is, it is a very broad *ultra vires* doctrine. I do not believe that it can be seriously entertained. On the other hand, the French have done remarkably able work in their Council of State in endeavoring to distinguish an official from a personal act. Take a letter carrier who comes around to deliver a letter and kicks the house dog on the door-step. Is he acting as a letter carrier and thereby representing the state, or is he acting as a private individual? People come into a post-office after hours. They know that they should not be in there at that time. Two of the clerks take an intruder by the coat collar, eject him and break his leg. Is that an official act? They were not charged with that duty at all. Is that an official act, or is that a personal act?

We have some experience in this country under our Workmen's Compensation and Employer's Liability Acts and under our common doctrines of the master's responsibility for the torts of the servant, as to what acts are done within the scope of the employment. The French Council of State, I think, furnishes us a useful guide in this connection. That is to say, if a policeman off duty assaults a private individual, he is not acting as an official of the state, but as a private individual. But if he does it with his uniform on while on duty, though it is not his job to assault private individuals, he does make the state responsible because that is committed within the scope of his employment, although it may not be within the scope of his duty and authority. So with the letter carrier and the post-office employees mentioned above. The draft code on international responsibility now under consideration proceeds on this distinction.

Professor JESSE S. REEVES. I should like to ask this question. I understood Professor Borchard to assume that in his opinion the breach would occur from an international point of view with reference to a concessionnaire, with the breach of the concession contract and not at the time of the actual denial of justice. From the point of view as to the theory of duty owed—if State A grants a concession to a national of State B and there is a breach of that contract, would you say that upon entering into that concession there was another duty immediately owed by State A to State B with reference to that contract?

Professor BORCHARD. Only in so far as all duties owed to aliens are theoretically owed also to their country and an injury to the alien is an injury to his state, if municipal law does not grant a means of pursuing the wrongdoer in some effective way. If not, the injury is then deemed adopted by the state. In some states, wrongdoing officials can be sued; in others, the state itself can be sued, as in France and Germany. Whatever remedy the local law accords, the alien must be granted.

Professor REEVES. But there is a direct duty between State A and

State B to give a national of State B his legal rights. Then it would seem to me that theoretically at least in international law as to the duty of State A to State B there is no breach until there is a denial of justice, and not at the time of the breach of the contract, especially if the national of State B is required to prosecute his rights in the courts of State B. Would it not be rather strange to say that State A has failed in its duty towards State B at the moment of the alleged breach of the contract? Would not an international court take the position that the failure of the duty begins with the denial of justice?

Professor BORCHARD. I would not think so. I cannot mentally conceive that a breach of contract could be lawful. It is an unlawful act right from the start. But perhaps domestically only. It becomes an international wrong when no domestic means of redress or no adequate and fair local relief is afforded. But the wrong has occurred just as it would in the case of a tort. I do not distinguish theoretically between an assault upon a private individual by an official of the state and a breach of contract by an individual who speaks for the state. Assuming that we can say that it is a breach of the contract, I think that the international wrong has occurred from the moment when it becomes clear that judicial relief is unobtainable locally.

There is a theory which asserts that the international delinquency has occurred from the moment of breach of the contract just as it has occurred from the moment a tort is committed, but that diplomatic interposition should be postponed until local remedies have failed, and that you should never make a breach of contract the subject of armed intervention, sometimes stated in the conditional form, until arbitration has been declined. I personally prefer the unconditional form.

Professor REEVES. I doubt if any Latin-American state would accept your proposition.

Professor BORCHARD. I would like to hear Mr. Hughes's view on that.

President HUGHES. This has been a very interesting discussion and I think that the eminent professors who have taken part in it have thrown a good deal of light on it.

It occurs to me that there is a distinction between a claim for breach of contract and a claim for breach of international duty. As Professor Borchard said, we may not know whether there is a breach of contract, we must await the event.

Of course it is quite usual for a foreign office, when it is advised that a claim of its national is not being treated with appropriate consideration, to make a polite suggestion to the foreign office of the other country of interest in a proper proceeding on behalf of the claimant. It is a very mild form of suggestion. It is always an act done with extreme regard to the sensibilities of the other party, particularly when, as in most cases, there is a forum, in the case of a contract, where the question of breach can be determined.

Suppose you have a government that has made a contract with a foreigner and that contract, in the opinion of the foreigner, has been breached and there is a forum provided by the government to which the foreigner can resort. The foreigner resorts to that forum and to his disappointment it is decided that he has no claim, that there has been no breach. Of course, if it is decided that he has a claim, that there has been a breach, presumably no question will arise for diplomatic interposition. But if it is decided that he has no claim, then what occurs? Is there an international duty? What inquiry must we make to ascertain whether there has been such a duty and whether it has been discharged?

Does that question concern necessarily the merits of the claim? I have seen claims before the United States Court of Claims which have been disposed of adversely to very strong contentions and which have also been disposed of adversely upon the findings of the Court of Claims by the Supreme Court of the United States. The parties and their counsel think that an injustice has been done. Embodied in some finding of fact which the Supreme Court was powerless to disturb, there was some error committed. It is believed to be of a fundamental character. The unhappy contractor goes without his pay. He goes to his counsel and his counsel says, "You cannot do anything. The last resort has been had and you must put up with it, but I do not agree with the decision of the court." That is no consolation to the contractor, but it is the end of his pursuit of justice in this country.

Now, if that contractor happens to be a foreigner or a foreign corporation, is it conceivable that the State Department of the United States would consider for a moment any claim interposed on behalf of the foreigner's government to have some international tribunal review the decision of the United States Court of Claims affirmed by the Supreme Court of the United States? I imagine the Secretary of State would give the scantest consideration to such a contention, and I imagine we should think that any foreign office under similar conditions would give very scant consideration to such a claim on our part. They would say, "We provided a system of justice which has been resorted to. There are no circumstances that differentiate your case from any case where there is a quarrel with the decision of the court of last resort. We are very familiar with that sort of thing and you must have it in your own country frequently."

I think that in such a case we should have to point to a breach of international duty as consisting in something other than an asserted error in the court proceedings. We should have to say, "You either did not provide any forum to which this man could resort, or your methods in the forum were such as not to permit a proper elucidation of the merits of the controversy," or "You in that forum dealt with the claim in such a way that it was a partial, prejudiced proceeding, and there has been no justice done in this case, and therefore we insist that you shall do justice."

It seems to me, therefore—and in respect to your inquiry I bow to the opinion of the experts here—that there is a difference between the mere breach of a contract, and the questions which arise thereon relating to the merits, and the international duty of the state to the other state of which the contractor is a national; that there are different criteria to apply.

A MEMBER. I would like to ask a question on the other phase of it, the wrong committed by private individuals against the aliens. Is there any distinction between the case where the wrong is directly committed against the alien by a private individual and a case where the wrong is done by the private individual but is made possible through some delinquency of the state or of the local authorities, where the private wrong has been done because the state did not perform its duty and thus made it possible? Does that put a different phase on it?

Professor BORCHARD. The moment the state participates by failing to prevent the injury, obviously you have a basis of state responsibility. Take the South Omaha riot of 1909. That involved a labor dispute. Certain elements objected to having certain Greeks working in the town of South Omaha in the packing industry, and they decided to run the Greeks out of town as the quickest way of solving the labor difficulty. There were rumors of the proposed action around the town on Saturday night. On Sunday afternoon at three o'clock the riot occurred. The claim of the Greek Government was finally acknowledged as valid by the State Department, largely on the ground that the police officials might have known by the rumors then current that something was about to happen and should have exerted greater protective measures to prevent the injury. That is the kind of a case where the government's participation by failing to exert the protective machinery available has been at least a participating cause in the ultimate injury—failure to do what they should have done to prevent the injury that occurred.

If I might address myself a moment to one part of your remarks, Mr. Hughes.

May I suggest a case having some analogy to the Norwegian ship requisition case, decided by an international court of arbitration. Assume that the Norwegians had pursued their remedies in the local courts, and we had said through the Court of Claims where they could have brought their action: "You are not entitled to be paid for the unperformed contracts which you have made for the building of ships. That is not a part of your damage, but only the ships actually taken over." Assuming that to be the fact, would Norway be bound by that determination of the Court of Claims or, let us say, of the United States Supreme Court? Could Norway have said, "You have violated our citizens' rights by taking not only their ships but their contracts, and an international court would give us relief for those unperformed contracts which you have requisitioned?" So the states south of us maintain now and then in their courts that there has been no breach

of a concession-contract, when the concessionaire complains of breach. Would we be necessarily bound by that decision if we thought there had been a breach of contract or must we go further, and establish that in the pursuit of his local remedies the American contractor had sustained a denial of justice in the technical sense—that is, not merely that there has been an interpretation of the contract different from what we thought was proper, or that there has been a failure of redress without any unfairness in procedure—but that in addition there has been a denial of justice? So the Norwegians could certainly not have said that there had been a denial of justice in our Court of Claims in compensating them only for the ships we had requisitioned. That was done according to proper form of law and the best judgment of the judges of the Court of Claims; but would the Norwegian Government necessarily have been foreclosed in saying, "You have not given to our citizens all the rights to which they are entitled internationally, for they could also assert a claim for the unperformed contracts to build the other ships?"

President HUGHES. I do not wish to abuse the privilege of the Chair by indulging in anything that looks like a debate, but it seems to me that this is a very important subject. There are certain suggestions to which the remarks of Professor Borchard give rise in my mind.

Of course you can never preclude a state, an independent state, from presenting its views on any subject of international controversy, whether those views are right or wrong, unless you have planned an obligatory arbitration or compulsory resort to a tribunal. We have found sometimes, even in cases of arbitration, that awards were not accepted and that stout representations were made by a government in opposition even to the final awards of the international tribunal. The question is rather as to the attention which the other state will give, and should give, to the representations that are made by the complaining state. Nothing can still the complaints of a state that has a sense of injury, but whether the other party to the controversy should give heed to them will depend upon its own policy to a certain extent, and to a large extent upon the state of public opinion and the principles which are supposed to govern the particular instance.

To recur to the precise point, I confess I find a good deal of difficulty in avoiding the selection of one of these alternatives in the case of a contract made by a foreigner with a government, either that there is a right to the decision of an international tribunal in all cases if the government does not otherwise satisfactorily dispose of the case, or that there is not such an absolute right and there are qualifications to be maintained. If you say that there is an absolute right in every case to have an international tribunal, that means that every question of fact and every question of law that is decided adversely to the claimant in the national tribunal may be reviewed in an international tribunal as a matter of right. Now these bases of dissatisfaction are various. Sometimes they turn entirely upon the testimony

of witnesses over a matter of fact. Sometimes they involve mixed questions of law and fact, or do not turn so much upon principles as upon the way in which the principles are applied in circumstances where questions of law and fact are interwoven closely. Then again you may have a difference of opinion as to principle. But it is recognized that there are permissible differences of view as to the principles invoked. Or there may be complaint as to errors in the logical application of principles. You may have another case where the principle of the decision is such as practically to deprive the party of any remedy whatever, and you may regard the decision as an arbitrary act, as an abuse of justice.

Now if we are not prepared to say that there is an absolute right to the decision of an international tribunal, and I cannot see how we can say that, what is the qualification? Is it not that there must be something more than a possible error in a determination of facts or a possible error even in a determination of law, but some fundamental character of injustice which affords the basis of the international representation? There is something about the case, the way in which the claim has been dealt with, that gives the complaining government an opportunity to assert before the public opinion of the world, "We have not had fair treatment." And is not this the kind of case we are always thinking of in connection with certain governments, which we fear have systems of administration which do not give justice, and therefore we say, "You have your forms but we have been denied the reality, and we therefore insist on a claims convention. We will not abide by your decisions." If we get support in that, and other governments are disposed to come to a claims convention, it will be because of a deep-seated feeling that injustice has been done.

Professor EUGENE WAMBAUGH. Speakers have alluded to local law as furnishing useful analogies for ideal international law. I assent; but the analogies are, I think, imperfect.

My first point is a comment upon a suggestion to the effect, as I understand it, that whenever an alien is injured by a public executive official who is acting within the scope and course of his employment, there should be the basis for an international claim, similar to the responsibility imposed by the local law upon a private individual who employs another private individual to work for him. I agree. Yet, as to all public responsibility for misdeeds of an executive official, American law distinguishes between a government's governmental functions and a government's business functions, and imposes no public responsibility when an executive official does an injury while fulfilling a function classed as governmental. Now let us suppose that an official charged with functions of a governmental nature—for example, a policeman,—mistreats in identical circumstances two persons, one an alien and the other a citizen. In that case is it believed that international law should give for the alien a claim against the public, even though local law gives no similar claim to the citizen? I acquiesce; but simultaneously I

emphasize that herein ideal international law would depart from American law.

My second point is more intricate. It deals not with executive wrongful acts but with executive wrongful failures to act, preceding or accompanying or following the misdeeds of private individuals. Here American law encounters puzzling problems. One brief example must suffice. Let us imagine a killing by a mob. In every one of our States there exists executive machinery for preventing and punishing that crime. Let us suppose that the proper executive officials have made no attempt toward either prevention or punishment. Now arise questions in American law. It is asked whether the State, through the inaction of its appropriate executive officials, has deprived the victim of life without due process of law—to adopt phraseology from the Fourteenth Amendment to the Constitution of the United States. It is also asked whether Congress could pass a valid statute imposing a penalty upon the municipality or county or State wherein the crime was committed. Clearly those questions in American law bear some analogy to the question whether the lynching of an alien should give rise to an international claim. Yet it is also clear that the analogy is remote, that those questions in American law are largely based upon provisions in the Constitution, and that the answers to such questions in American law cannot be deemed final when a claim is presented against the United States by another country.

My third point is still more intricate. It deals with short-comings not of an executive department but of a court. Should ideal international law give to every unsuccessful alien litigant a right to an international claim? Certainly not. There are, however, possible instances so outrageous as to create such a right. Examples would include, no doubt, refusal of what lawyers call "a day in court," or, again, the presence of a mob in the court room, or, still again, a discrimination by judge or jury against the alien litigant as and because an alien. Those examples suggest an analogy to the question in American law as to the right of an unsuccessful litigant to go from a State court to the Supreme Court of the United States upon the ground that the State through an error in its judicial department has deprived him of life, liberty, or property without due process of law. Not every unsuccessful litigant in a State court is permitted to do that; but there are conceivable instances of judicial short-coming—not yet capable of exact and complete statement—for which that remedy may be available. The analogy between that problem in American law and the somewhat similar problem in international law is indeed interesting and enlightening; but here again, just as in the earlier parts of my discussion, it is obvious that for the purposes of international law the analogies drawn from American law are not conclusive.

My three points may be condensed into what might be called a head-note to the effect that when we deal with international questions we cannot accept

as safe and final standards for world-wide justice the doctrines and analogies of local law.

Mr. JACKSON H. RALSTON. The question which appears to be under discussion now borders very largely on a matter much discussed, as I have found in the books, at least in a parallel way. We are told by so many of the authors that an arbitral decision may be attacked for essential error in it, and I take it a somewhat analogous rule exists when we undertake to attack local decisions in an international tribunal. The difficulty of the question comes in determining what is essential error. I have not been able to find among such European authors as I have had an opportunity to consult any very adequate description of what constitutes essential error, and they seem, I think, to be very much in a fog on the subject.

If I may be allowed to make an observation, it does seem to me that one class of errors may properly be called essential and, whether they exist in an international tribunal or whether they exist in a local tribunal whose judgments are called in question internationally, may be regarded as fundamental. I mean to say what we would call a jurisdictional question, using the word jurisdiction in various senses to which it may properly be applied, that is to say, jurisdiction over a person, jurisdiction to pass a particular decree, and the proper jurisdiction over the whole subject-matter. Of course, it might also mean the right to appeal to international tribunals for what comes under the head of notorious injustice which may occur, we are all obliged to admit if we practice law, which may occur in a judicial tribunal.

Let me say just a word as perhaps having a practical application to what I have so far remarked about the Norwegian cases. At the same moment almost that my good friend Mr. Dennis was arguing at The Hague that the United States should not be punished for the taking over of unfinished contracts and should not be compelled to pay or account for the potential profits in such contracts, it fell to my lot to take exactly the reverse attitude in a case in the Court of Claims, the Brooks-Scanlon case. Now Mr. Dennis was unfortunate in his contentions at The Hague, and for the moment at least before the Court of Claims I was unfortunate, for it decided, at least a majority of the court decided, that particular proposition in favor of the United States but, however, and it is a matter of interest, when that particular case was appealed to the Supreme Court of the United States, the judgment of the Supreme Court was in effect the same as the judgment which was rendered in the Norwegian cases at The Hague; in other words, both the Supreme Court of the United States and The Hague court held the United States responsible under very parallel circumstances and with at least some resemblance of reasoning in the announced decisions.

Now with one further observation, I want to close what I am now saying. Suppose the Brooks-Scanlon Company, which was my particular client in that case, beside losing in the Court of Claims, had also lost in the

Supreme Court of the United States. Being, as it was, an American corporation, it could not have done anything with reference to the subject. Is there any reason why, if it had been a foreign corporation, it should be heard in an international tribunal? Here was a plain disputed question of law, straight out law, without any complications of violence or anything else affecting the decision. Suppose the Supreme Court of the United States had so far, if you will allow me to say, erred as to say it was entitled to no remedy, if that had been a foreign corporation would that company properly have had an international appeal? It would seem to me not. That is an error which would not be within any proper sense of the word what we might term essential error. At least that is the way it appeals to me.

Mr. HOWARD T. KINGSBURY. I did not have the advantage of hearing the paper on the subject that was read at the recent session, but I have followed this discussion with very great interest; and there is one suggestion that I should like to venture and that is, that it seems to me that there is an essential distinction between the determination of a question, of the nature discussed, by the municipal courts and an opinion by an international tribunal or international claims commission. It is this—that the local courts are necessarily bound by local statutes and local decisions, and to a considerable extent influenced by local prejudice and conceptions of national or local policy that may be involved in the determination, whereas, in theory at least, an international tribunal is enabled to consider, not the local regulations, but the principles of inherent justice, so far as there is any such thing as inherent justice, that may affect the question under consideration. That, parenthetically, seems to me perhaps to work against an attempt to codify too literally the entire body of international law, because, when entirely crystallized, it may become harder to refer to principles of underlying justice to determine difficult cases.

As to the distinction between the right of a national to some further review of a question decided against him by national courts and the right of an alien to do so, there is at least this justification for it. In this I am endeavoring to reply, somewhat faintly, to the last speaker. As a national of any one nation, a man is bound by his allegiance to accept as final the laws and customs and regulations of his own country. They may be unjust sometimes, or seem so to him, but they are the principles of the nation to which he belongs and he has no other recourse or redress against them, whereas an alien is not bound to accept an injustice of the system of any other nation as final, and so may have another opportunity of a review by diplomatic discussion, voluntary arbitration, or any form of compulsory arbitration to which the other nation may have assented.

Mr. CHARLES HENRY BUTLER. Let me have two minutes to tell a little story showing that decisions which are diametrically opposite in what are apparently similar cases are not always necessarily inconsistent. In the early days of my reportership of the Supreme Court of the United States I

reported two cases simultaneously decided by the court, one to the effect that title to public lands conveyed by the United States stopped at the border of a certain pond and the other to the effect that the title to land conveyed by a similar patent went to the center of that identical pond. The decisions seem to be very inconsistent, but, as a matter of fact, they were perfectly consistent, because it so happened that the State line of Indiana and Illinois goes through the center of that pond, which had dried up. Squatters went on the land and attempted to file entries, and the original patentees, who claimed they had title to the center of the pond, brought ejectment. The Supreme Court decided that as United States patents of public land are to be construed according to the law of the State in which the land is situated, and the law—I have forgotten which was which—of one State carried land under a deed similar to such a patent to the center of the pond and the law of the other State only carried that title to the water line, the patents were construed each in accordance with the laws of the respective State in which the lands were situated.

Although these two decisions were apparently diametrically opposed to each other, both of them were exactly right. The parties holding the patents of the United States necessarily took them subject to their legal construction, and, as to the land in Indiana they were subject to the law of that State, and as to the land in Illinois the law of that State controlled, notwithstanding the laws of the two States were diametrically opposed to each other.

As to the case of the Norwegian ships referred to by my friend Mr. Ralston, let us suppose that the Government of France had similarly condemned some ships in process of construction and that under the law of France such profits could not be allowed, although under the law of the United States such profits could be allowed. If there were an international court having jurisdiction of both cases, its decisions would have been controlled by the laws of the respective countries in which the foreigners voluntarily went for the purpose of carrying on their business, and, while they might have certain rights under the law of one country, they would not have them under the law of another. It by no means follows that where a foreigner voluntarily enters a country for the purpose of carrying on his business and making money, his rights should not be controlled by the law of that country, and that he should consider that he has been aggrieved because his rights are not exactly the same as they would be in his own country or in that of his operations, that is, of course, where the element of discrimination on account of alienage is not involved.

Mr. WILLIAM C. DENNIS. I was very much interested in Mr. Ralston's remarks, and by way of answer to his query as to whether or not if the Supreme Court had decided the other way in the Brooks-Scanlon case the decision could properly have been made a matter of international complaint, I venture to suggest that a decision either way on any question of law which

my Brother Ralston could argue on one side and I on the other could not be so clearly and obviously wrong that it could properly be deemed "essential error."

There was never any quarrel on the part of the representatives of the United States in the Norwegian Arbitration with the decision of The Hague Court because the decision was against us. Our objections lay in other directions. The principal question decided against us by The Hague Court was the question as to whether or not certain contracts were requisitioned, and that was a very difficult and intricate question, much more a question of fact than of law, requiring the examination of voluminous records covering thousands of pages. That was a question upon which the Supreme Court of the United States was divided, although the majority reached the same result as The Hague Court. I do not believe that a decision either way upon that question by a competent national tribunal would have been a matter which could properly be made the subject of international complaint.

As Mr. Ralston says, the question, "What is essential error?" or "What is a denial of justice?" is one of the most interesting and difficult questions in international law. I can scarcely think of a more profitable subject for our discussions.

The common use of the words "essential error" as words of art in this connection dates, I suppose, from the project of the Institute on arbitral procedure adopted at The Hague in 1875 of which Goldschmidt was the reporter. It was argued very strenuously by Venezuela in the Orinoco Steamship Case before The Hague Court, and with some justification in the text of Goldschmidt's report, that "essential error" must be an error brought about by fraud or forged documents. The United States argued, on the contrary, that the reference to false documents in Goldschmidt's report was simply illustrative; that fraud was merely one kind of "essential error." The Hague Court failed to decide this question.

Jurisdictional error might be regarded as another kind of "essential error," but I suppose according to the Institute's project it would probably be classified as "excess of authority" or, as we more frequently say nowadays, "disregard of the terms of submission." But true "essential error" or "denial of justice" means, it is submitted, not merely an incorrect decision, but an outrageous decision. It is a difference in degree, but a difference of degree may, as Mr. Justice Holmes has pointed out, become a difference in kind.

The situation which arises is roughly analogous to the situation in our municipal law which justifies the setting aside of a verdict of a jury. It seems to me that if a decision of the highest court of any country regarded as a member of the society of nations is to be set aside, it must be so outrageous that the international court can find that no honest and reasonable court acting reasonably could have made such a decision, which of course,

as a learned English judge pointed out in discussing a similar situation, does not mean that the international court finds that the members of the national court are not reasonable men, but it does find that their judgment in the particular instance was not a reasonable judgment. It is a difficult thing to prove a situation like that. There are unfortunately only too many instances where such a thing has happened, but it is a difficult thing to prove. Still, I believe that the general good of international relations requires that the plaintiff should be held up to that standard of proof, and if this is done, I see no reason why the decision of the highest court in any country should not be examined on that basis to see whether by some mischance even the highest national court has done something which no reasonable court acting reasonably would have done.

Professor QUINCY WRIGHT. It seems to me that Mr. Dennis and Professor Wambaugh have put their finger on the point. If we are going to have any appeal to international tribunals at all, there has to be a conception of an international standard of justice. Ordinarily the tribunals and activities of the state are final, but if they fall short of the international standard of justice, there is then an appeal. The situation, as Professor Wambaugh suggested, is analogous to that under the Constitution of the United States. The provisions in regard to "due process of law" and "impairment of the obligation of contracts" may be said to have set up a Federal standard of justice, and if States fall below that, there is an appeal from the State tribunals to the Federal Supreme Court.

How to define the international standard of justice? That is a problem with which Professor Borchard and the committee on which I have the pleasure to serve are concerned. It is obviously an extremely difficult if not dangerous matter to try to define this standard with rigid rules or principles. It must be defined rather vaguely and, as Professor Borchard says, because of that, it is especially necessary that there should be an opportunity to submit cases involving it to an international court. In this way the international standard of justice will gradually emerge from judicial decisions. It seems to me that the only way we can build up any conception of an international standard of justice is through the gradual development of precedents, and I think that is what Mr. Dennis had in mind. If we try to define the conception too rigidly we will fail. The meaning of "due process of law" under the Fourteenth Amendment of the United States Constitution is decided by successive decisions of the Supreme Court. Could we not have a similar general clause in our international code? This would allow a more precise definition to evolve through the multiplication of decisions.

This raises a question which to me is fundamentally a question of procedure. In this subject, more than perhaps most, procedure is linked up with substantive law. Now we, as jurists, would like to hold that any case in which there is a claim that the state has failed in its responsibility towards

aliens within its territory should be a matter of diplomatic discussion or voluntary arbitration and judicial decision rather than a matter of coercion. Certainly it is undesirable that such cases should be the subject of forcible action. There is, however, this great difficulty; that problems in regard to reparation are very frequently mixed up with problems in regard to immediate protection. It seems to me quite probable that states would be prepared to agree that they would not use forcible measures and will eventually submit to arbitration claims for reparation on account of injury to their citizens. But very frequently when such claims arise there is a state of disorder and a need for protection in the country involved, and consequently states feel under the necessity of doing something immediately to protect their citizens who may lose their lives unless something is done rapidly. Hence the desire of the state to take some immediate forcible measures for the protection of its citizens is frequently linked up with the demand for reparation. Thus it is very difficult to draw up procedural rules requiring that all claims in regard to aliens abroad be submitted to a tribunal, without apparently limiting the claim of the state to interpose for the protection of its citizens in immediate danger. I suggest that the best we can do is to attach to any articles which we might draw up with regard to responsibility of states, a simple clause saying that questions which arise between states, which diplomacy fails to settle, with regard to the interpretation of these articles, shall be submitted to arbitration. That would leave open the problem with regard to the immediate protection of endangered citizens abroad.

Professor BORCHARD. I would like to say, first, how much I have profited by all this discussion in the clarification of my own mind.

I wonder whether Mr. Dennis would carry his doctrine to the point of saying that, even when the local courts deal with a matter of international law, their decision, even though not chargeable with bad faith, is final. I can hardly believe, for example, that when the French courts decide that the meaning of Article 56 of Declaration of London, to the effect that a transfer from a belligerent to a neutral flag cannot be made even when the ship is in port, that that is finally binding on the United States, let us say, if the United States believes that Article 56 of the Declaration of London means something entirely different.

Mr. DENNIS. I was not thinking of that sort of situation.

Professor BORCHARD. The question I first brought up resolves itself into this difference of opinion, whether, when an alien had made a contract with a foreign state, regardless now of the question whether international delinquency occurs on the breach of the contract or after, whether in order to make that breach the subject of an international claim you shall be permitted to assert merely that there has been an error, that is, that the alien has not got his legal rights as we think an international court would decide it or the foreign office of the claimant country thinks it ought to have been decided, or whether you have to go further and establish that there has been

what we call a technical denial of justice, involving some element of bad faith or gross inadequacy in the judicial process. Actual decisions can be found on both sides of that issue, and it is a question that perhaps should be pretty carefully considered. The Latin American states generally insist that there must always be a denial of justice, whereas some European countries occasionally insist that all they need to show is that the alien has not got his rights as an international tribunal would interpret them.

I believe Professor Wambaugh must be considered correct in the suggestion that we cannot decide the international rights of aliens by local law, though the question necessarily arises, what are his international law rights? For example, long before the Act of March 3, 1925, in which we made the United States responsible for collisions of public vessels with private vessels, the United States was internationally responsible for that very kind of injury to aliens. When our warships ran down French and British merchantmen, we had to make the damage good, although had the injured vessel been an American vessel, there was no legal recourse in the United States. Possibly that very fact of lack of local means of redress furnished the foundation for the international claim. The only thing an American claimant in such cases could do would be to go to Congress and ask for relief. Thus local law is very often behind international law in these respects. That I do not think is a cause for particular concern. At the same time it must be kept in mind when we deal with the question whether a local decision can be regarded as final even though wrong, when rendered in entire good faith.

The question of policy that our committee will have to consider is on the first point: Shall we say that when an alien makes a contract with a foreign country, not only must he exhaust his local remedies, but he must, before he can make his claim a subject of diplomatic interposition, establish that there has been a technical denial of justice. Perhaps we ought to make such a decision. It is an important question, and is open to a good deal of discussion, and I should be glad if the members of the Society would give it their consideration.

Mr. CHARLES WARREN. In your remarks just now you referred to a breach of contract and you used the words "the international law of contracts." May I ask you, sir, is there any international law as to breach of contracts? Is not a breach of contract always a question of local law?

Professor BORCHARD. There may be a difference of opinion on that. A contract, as a rule, when made between an individual and a state rather than between two states, is made under some local law, to be sure. Many of these obligations when they come before an international tribunal are measured by what are called international standards of legal duty—an uncertain and sometimes dangerous rule—a kind of natural law conception.

Mr. WARREN. Is there any international law on breach of contract?

Professor BORCHARD. I would suppose it would not be an improper statement to say that international law requires that contracts duly made

shall be performed. International tribunals have dealt with breaches of contract very often quite independently of the local law. It may be they were mistaken, but I am ready to believe that there would be an international law on the question of contractual obligations. The Supreme Court is only a municipal court, and our Supreme Court has on occasion been overruled by an international tribunal. (See the decisions of the British-American Claims Commission, May 8, 1871, which, however, reviewed prize law decisions of the Supreme Court.) The Supreme Court will enforce international law only if there is no municipal law to the contrary; but if there is a municipal law to the contrary, it will enforce the municipal law, as the Supreme Court in the Chemical Foundation Case sustained an administrative manipulation of the municipal law resulting in a possibly ninety-five per cent confiscation of private property; but that was not international law, nor did it purport to be.

Professor CLYDE EAGLETON. I would like to support Professor Borchard upon the question of contracts, that is to say, that breach of contracts should produce responsibility at once, but I do not think that practice will support that position. On the other hand, I am afraid that practice requires a denial of justice or a confiscatory breach or some such thing as that. But as a matter of codification, I see no reason why an obligation made by an agent of a state of a contractual nature should not produce responsibility; and I should like to see go into the proposed code a proposition that the state is responsible from the moment of the breach, or else certainly I should say that local remedies should always be resorted to.

One other point. I suggested yesterday that the international standard as applied to local remedies has the effect of lifting up the domestic administration of justice. We have an illustration of that as given a moment ago by Professor Borchard with regard to ship collisions. It has been suggested that a rule should be adopted in the code, to the effect that states should be required to give pecuniary compensation; that even though in such countries as the United States there is no municipal law to that effect, international law should provide for it. There is an important question which I should like to hear the society discuss.

Mr. EDWARD A. HARRIMAN. I would like to ask Professor Borchard about the international law of contracts. I should like to know whether he thinks there is any international law of contracts that would enable the court to determine the amount of money due from France to the United States.

Professor BORCHARD. I do not know whether it would or not. But if the issue were unreservedly presented by the two countries, I should suppose that there would not be much difficulty in the international court reaching a decision how much the French owe. After all, the United States has the signature of France to certain notes, I presume, and the international court would pass upon the validity of those notes and determine the amount due under them. I would not suppose they would have much difficulty about

that, but even if they did have, they would have to decide the case just the same, and we would have to accept their decision, presumably.

Professor GARNER. I would like to ask Professor Borchard a question. I should like to ask him if the foreign offices and the international tribunals, in determining the responsibility of the state for breaches of contract, are not guided usually by the character of the breach? In other words, do they not make a clear distinction between injuries that result from breaches of contract that are arbitrary, deliberate and flagrant, such, for example, as where a contract or franchise concession has been arbitrarily revoked, or where a debt has been deliberately repudiated or depreciated by an act of the legislature, or where a breach of contract also involved a tort, as where a bridge built by an alien contractor or his machinery has been seized, on the one hand, and other injuries which are more or less incidental, as where there has been a default in the payment of a debt due not to any deliberate or wanton act of the state but a result of its honest inability to pay the debt. Now in the one case I see no reason why the state is not responsible for the injury and liable without any distinction between responsibility for injuries resulting from contracts and those resulting from tort. It is a matter of the character of the wrong and not whether it is merely a breach of contract.

Professor BORCHARD. Professor Garner is quite right. He brings up a distinction pretty well understood, that (a) when a contract involves open repudiation or confiscation or some tortious element, some outrageous breach, the right of interposition is deemed to accrue immediately on the assumption that local remedies would be futile to invoke; and that (b) when there is merely an inability to pay, the right of diplomatic interposition does not then accrue, and that local remedies must be exhausted. In any event, where there are effective remedies, they should be availed of to see whether the domestic wrong cannot be locally righted. If the breach involves some tortious or outrageous element, the exhaustion of local remedies is often dispensed with, presumably on the theory that they would prove futile. But the international claim must be founded on inability to obtain local redress.

I would like to hear Mr. Nielsen on that subject.

Mr. FRED K. NIELSEN. The fact that Professor Borchard may want to hear me is not conclusive evidence that anybody else may desire to hear me. I might talk to him in private.

I really think that I ought not to say anything about the questions under consideration, because I just dropped in and I am not conversant with the trend of the discussion. I am not sure that I can say anything in harmony with what I have heard stated during the last few minutes, but I may leave this thought with you: that in talking about questions of international law we are likely to confuse issues if we talk too much in terms of domestic law. In discussing questions such as have been touched upon here, I aim not to speak any more than is necessary about torts or contracts. I think that the criterion of liability in any given case must be: has there been a

wrong under international law? An international court, as I think Professor Garner suggested in substance, is not concerned with an action in assumpsit, or debt, or with an action in tort; these are terms of domestic law. It is concerned with the question whether a wrong in violation of international law has been committed; whether, as Professor Borchard said, there has been an international delinquency; whether there has been a failure of compliance with a rule of international law; whether authorities of a nation have committed acts for which the nation is responsible under international law.

I have joined in making, or have made individually, some declarations to the effect that cognizance of breaches of contract may well be taken by an international tribunal. No one I believe disputes that confiscation of property is a violation of international law. Confiscation is odious to the legal sense, if I may use that expression, and odious to the moral sense, of the world. And I see no legal difference between the confiscation of the right that a man has in a contract and the confiscation of a piece of land. If a government agrees to pay a considerable sum of money for some valuable property and fails to pay that money, I think that an international tribunal should have no difficulty in saying that the purchase price of that property has been confiscated, or it might be said that the property has been confiscated. Of course, it will require an examination in the first instance of local law to ascertain what rights if any a claimant has under the contract. And if ascertained rights have been invaded, and property rights in a contract have been confiscated, then a tribunal will, as tribunals have often done, assess damages.

So, too, I think it is advisable not to use too freely the term "torts." That is a term in our domestic jurisprudence. If soldiers under certain circumstances despoil property, that is a wrong according to well-established rules of international law. In such a case the question is: has there been committed an international tort, if I may use that term?

Now I do not want to go into the question how you ascertain whether acts of omission or commission may result in an international delinquency, or whether certain acts may be the basis for a direct responsibility. I think I have said that it may be proper to consider the term "denial of justice" as the general ground of diplomatic intervention, and that a denial of justice may be predicated on legislative action, executive action, or judicial action, according to criteria which are perhaps not very definite. I have suggested that the test is whether there is convincing evidence of a pronounced degree of improper governmental administration. That test may perhaps be considered not to be so very definite, but I believe that it is a practicable and useful test.

I hope there is something in the thought that I have roughly thrown out, that when we talk about treaties and about international law we should avoid terms of domestic law and apply the proper rules and principles of international law applicable to any given case.

BUSINESS MEETING

President HUGHES. The Chair is reluctant to bring this interesting discussion to a close, but we have a business meeting which should be held, and unless someone is very desirous of speaking upon the subject we have been considering, we will end the discussion.

(After a pause)—

We will now consider ourselves in session for the purpose of transacting business, and the first item of business is the report of the Committee on Honorary Members of which Dr. Hyde is chairman.

Professor CHARLES CHENEY HYDE. The Executive Council recommends to the Society for election to honorary membership Dr. Dionisio Anzilotti, now President of the Permanent Court of International Justice at The Hague.

President HUGHES. You have heard the report of the committee recommending the election of Dr. Dionisio Anzilotti as an honorary member of the Society. It is moved and seconded that Dr. Anzilotti be made an honorary member of the Society.

(The motion was put and unanimously carried.)

(At this point, Dr. James Brown Scott, a vice-president, took the Chair.)

Chairman SCOTT. The next is the report of the Committee on Nominations.

Mr. HOLLIS R. BAILEY. The Committee on Nominations makes the following report (reading):

REPORT OF THE COMMITTEE ON NOMINATIONS

For Honorary President: Elihu Root.

For President: Charles Evans Hughes.

For Honorary Vice-Presidents: Charles Henry Butler, Frederic R. Coudert, John W. Davis, Jacob M. Dickinson, Charles Noble Gregory, Frank B. Kellogg, Robert Lansing, John Bassett Moore, Edwin B. Parker, Jackson H. Ralston, George Sutherland, William H. Taft, George Grafton Wilson and Theodore S. Woolsey.

For Vice-Presidents: Chandler P. Anderson, David Jayne Hill and James Brown Scott.

For Executive Council to serve until 1930: Frederick A. Middlebush, Missouri.

For Executive Council to serve until 1931: G. H. Hackworth, District of Columbia; Charles E. Hill, District of Columbia; Manley O. Hudson, Massachusetts; Edwin R. Keedy, Pennsylvania; Charles E. Martin, Washington; Leo S. Rowe, District of Columbia; Henry W. Temple, Pennsylvania; and Charles Warren, District of Columbia.

Chairman SCOTT. You have heard the nominations; are they seconded?

(The nominations were seconded.)

Chairman SCOTT. Are there any further nominations?

(It was moved, seconded and carried that the nominations be closed.)

Chairman SCOTT. Is it your pleasure that the Secretary be instructed to cast the ballot of the Society for the persons nominated?

(It was moved, seconded and carried that the secretary cast the ballot.)

Secretary GEORGE A. FINCH. I have cast the ballot.

Chairman SCOTT. I declare the respective officers elected for the ensuing year.

(Mr. Hughes thereupon resumed the Chair.)

President HUGHES. I wish to express my gratification at receiving this marked renewal of your confidence. I count it a great privilege to attend these meetings. I am happy to be relieved from any severe burdens in connection with the work of the Society. I have had in these gatherings of recent years the most delightful contacts and have learned a great deal. I regard it as a post-graduate course. I have heretofore had opportunities in devoting myself to applied science. Now I am very glad to come in contact with the pure scientists and to have the opportunity of sharing in research which has none of the alloy of the particular policies of the government.

We have had a most interesting meeting, I think, this year. There has been a constantly maintained interest in the subjects under discussion.

We have a very ambitious program for the future. You will hear more about that, I hope, when we get the report of the committee that was appointed to consider the development of our program and the methods which we can adopt to make these meetings even of greater interest. I look forward to the time when the meetings of this Society in Washington will be regarded as perhaps the most important event of the year of a non-political sort in this capital.

I feel that we are under the greatest obligation to those who are experts in the study of international law for the time they give to this work of the Society. So far as I am personally concerned, you can command whatever I can give because I am deeply interested in all of the enterprises to which we are devoted in the Society, and I especially enjoy the privilege of meeting with you and knowing you more intimately than would otherwise be possible.

What business is there to be brought before the Society? Is there any miscellaneous business?

Dr. SCOTT. There was a resolution adopted yesterday at the meeting of the Council which I hope to have the privilege of reporting.

First of all let me avail myself of the occasion, if I may do so with propriety, to refer to the services rendered by the Committee on Program this year. The chairman of that committee, Professor Stowell, has devoted himself seriously and has given his undivided interest to the program. It was his suggestion that there should be but one speaker at a session. His was the suggestion that the papers should be followed by scientific discussion; and the great success which we have had in this meeting, greater, I believe, than on any other occasion which I have had the pleasure of being in attendance, is, I believe due to Professor Stowell's initiative and to the care and skill with which he has piloted the ship through the storm.

That this may be a matter of record, I move you, sir, a vote of appreciation to Professor Stowell as chairman of the Program Committee for the year 1928.

(Which motion was duly seconded.)

President HUGHES. It is moved and seconded that a vote of appreciation be extended to Professor Stowell as chairman of the Program Committee.

(The resolution was unanimously carried.)

President HUGHES. We are very earnest in this expression of the appreciation we have for Professor Stowell and his associates.

Dr. SCOTT. Yesterday I had the opportunity to lay some considerations before the Executive Council as to the means by which the labors of the Society, now placed upon such a high plane, should be continued and rendered indeed more important. When we started out some twenty-two years ago to found this Society it was necessary to have members. We have procured members, members selected from practitioners of law, diplomats, statesmen and, last, but surely not least, professors, teachers and instructors of law in our higher seats of learning. These members have united and fraternized and made a success of the Society. It is evident that its labors may be looked upon from a two-fold point of view, labors of a technical nature and labors of what I should call a cultural nature, and it just so happens that due to a happy innovation, the division of the program, it is this year more apparent than ever before that these two elements can co-exist.

I have been asking myself if it were not possible to divide the work of the Society in such a way that the morning and afternoon sessions may be devoted to scientific and technical considerations of the important phases of international law, international procedure, international practice, leaving to the evening sessions the cultural elements for which this Society has stood and for which I believe it must in the future continue to stand.

If a proposition to this effect would meet with your favor, it would be possible to devote the morning and afternoon sessions to a continuation of the movement which has here been inaugurated and invite members appointed in advance to consider certain subjects carefully chosen in advance to report to the Society, perhaps to the Executive Council in advance of the meeting, which could act as an advisory body, so that each meeting would mark an era or an epoch in the development of international law in this country of ours. In this way our Society, without ceasing to be cultural, would become technical.

Yesterday I had the pleasure of laying before the Executive Council a proposal for the appointment of a committee of seven on program and scope to consider the activities of the Society in order to maintain the fruits which already seem to be ripe and only need to be plucked. The motion was carried and the Chair directed to appoint seven members of the Society, with power to consider and to report to the Executive Council in order that its

resolutions or its decisions could be carried into effect and be incorporated in the proceedings of the next year's meeting. The Chair, I understand, is prepared to announce the members of this very important committee, a committee whose members will, I verily believe, hold in trust the future of our Society, and, if they should act with wisdom, reconcile what is so difficult to bring together and to have work in harmonious coöperation—the exigencies of science with the demands of culture.

President HUGHES. The Chair is prepared to appoint the committee as follows: Dr. Scott and Messrs. Edwin D. Dickinson, Charles K. Burdick, Manley O. Hudson, Thomas R. White, Quincy Wright and Arthur K. Kuhn.

I would call attention to the fact that there is to be a meeting of the Executive Council immediately after the adjournment of this session, and I wish to remind you that the following honorary vice-presidents have been chosen and by virtue of their office will become members of the Executive Council in addition to those already serving: Edwin B. Parker and J. H. Ralston.

The new members of the Executive Council are Frederick A. Middlebush, elected to serve until 1930, and the others to serve until 1931; G. H. Hackworth, Charles E. Hill, Manley O. Hudson, Edwin R. Keedy, Charles E. Martin, Leo S. Rowe, Henry W. Temple and Charles Warren.

I mention the names of these gentlemen so that if any of them are present, who were not aware of the fact at the time of their election, they will remain for the meeting of the Executive Council.

Is there any further business to come before the meeting?

Professor REEVES. The Committee on Collaboration with the League of Nations Committee read its report at the opening session and it contained three recommendations. Those recommendations were concurred in by the Council at its meeting yesterday, but as they were recommendations to the Society, possibly they should be brought forward here.

President HUGHES. Have you a copy of them?

Professor REEVES. I can reproduce substantially the three recommendations.

President HUGHES. State the recommendations, and I understand you move their adoption.

Professor REEVES. That this Society expresses its cordial and hearty sympathy with the efforts now going forward of the so-called Harvard Research in International Law, which was described in the report which I read on Thursday evening.

Second, that the Society cordially endorses the proposal that through the columns of the *Journal* the results of that research be printed as far as practicable.

Third, that this Society expresses its approbation of the coöperation shown by the Government of the United States heretofore in connection with that process undertaken by the League of Nations Committee for the Codifi-

cation of International Law, and expresses the hope that the Government of the United States may see its way clear to participate fully in the forthcoming conference to be held at The Hague for the codification of the three subjects of nationality, territorial waters and the responsibility of states for damage done in their territory to the person or property of foreigners.

President HUGHES. You have heard the recommendations and the motion that they be adopted by the Society. Is there a second?

(The motion was duly seconded, put and carried.)

President HUGHES. It is now moved and seconded that we do adjourn.

(The motion was duly put and carried. Whereupon, at 12.20 o'clock p. m., the meeting of the American Society of International Law adjourned.)

ANNUAL DINNER

The Willard Hotel, April 28, 1928, at 7.30 o'clock

TOASTMASTER

The Honorable CHARLES EVANS HUGHES
President of the Society

SPEAKERS

His Excellency M. PAUL CLAUDEL
French Ambassador

The Honorable FRANK B. KELLOGG
Secretary of State

Honorable EDITH NOURSE ROGERS
Representative in Congress from Massachusetts

Dr. JAMES BROWN SCOTT
Director, Division of International Law, Carnegie Endowment for International Peace

MEMBERS AND GUESTS

Mr. G. G. Ackerson, Jr.
Miss Eleanor Wyllys Allen
Hon. A. Piatt Andrew
Mr. Allison V. Armour
Hon. L. Astrom, Minister of Finland
Hon. Robert Bacon
Mr. and Mrs. Hollis R. Bailey
Mr. and Mrs. Albert Baird
Mr. L. Ward Bannister
Dr. Alexis de Boer
Mr. and Mrs. George Boochever
Prof. Edwin M. Borchard
Col. Clement L. Bouvé
Miss Bernice V. Brown
Prof. and Mrs. Philip M. Brown
Hon. Constantin Brun, Minister of Denmark
Miss Florence Brush
Mr. Walter H. Brush
Col. and Mrs. George W. Burleigh
Mr. Charles Henry Butler
Prof. J. M. Callahan
Mr. Kenneth S. Carlston
Mr. Mitchell B. Carroll
Prof. Carl Christol
Prof. Keith Clark
Prof. Kenneth Colegrove
Mr. Malcolm A. Coles
Mr. Guy W. Davis
Mr. Charles Ray Dean
Mr. Clarence W. DeKnight
Mr. Walter D. Denegre
Mr. and Mrs. Tyler Dennett
Mr. and Mrs. W. C. Dennis
Mr. and Mrs. Francis de Wolf
Hon. Jacob M. Dickinson
Mrs. Henry F. Dimock
Major and Mrs. John P. Dinsmore
Mr. George Donworth
Mr. Herbert Dore
Mr. Allan W. Dulles
Miss Nataline Dulles
Hon. Felipe A. Espil, Chargé d'Affaires of Argentine Republic

Mr. E. H. Feilchenfeld
Judge and Mrs. Edward R. Finch
Mr. and Mrs. George A. Finch
Miss Eleanor Finch
Hon. Hamilton Fish
Mr. Richard W. Flournoy, Jr.
Right Rev. James E. Freeman
Dr. Heinrich Freund
Dr. Harry A. Garfield
Prof. James W. Garner
Mr. and Mrs. R. L. Golze
Judge and Mrs. Goodwin
Judge and Mrs. Samuel J. Graham
Mr. and Mrs. Walton A. Green
Mr. Charles Noble Gregory
Mr. Chester A. Gwinn
Dr. Max Habicht
Mr. and Mrs. Green H. Hackworth
Prof. J. Eugene Harley
Mr. E. A. Harriman
Mr. and Mrs. W. O. Hart
Dr. Henry B. Hazard
Mr. L. J. Heath
Dr. David Jayne Hill
Mr. Walter L. Hill
Mr. Frank E. Hinckley
Mr. Harold Hirsch
Mr. Stanley K. Hornbeck
Prof. Manley O. Hudson
Mrs. Charles Evans Hughes
Mrs. Bert L. Hunt
Mr. Charles Cheney Hyde
Dr. Nero Idman
Prof. Eldon R. James
Prof. Philip C. Jessup
Miss Amy H. Jones
Prof. Thorsten Kalijarvi
Miss Grace I. Kanode
Mr. Robert F. Kelley
Mr. Martin H. Kennedy
Judge and Mrs. Charles Kerr
Dr. Otto Kiep, Counselor of the German Embassy
Dr. and Mrs. Wilhelm Kiesselbach
Major and Mrs. Archibald King
Col. and Mrs. Howard T. Kingsbury
Mr. and Mrs. G. S. Knowlton
Hon. and Mrs. Robert Lansing
Prof. John H. Latané
Mr. Stanislaw Lepkowski
Mr. and Mrs. Robert D. Longyear
Mr. and Mrs. Ralph R. Lounsbury
Mr. E. Russell Lutz
Mr. Archer MacDougal
Miss Mildred Maddox
Mr. and Mrs. Harold N. Marsh
Prof. Charles E. Martin
Mr. and Mrs. Cloyd H. Marvin
Mr. Jorge Mayer
Mr. Fenton R. McCreery
Col. and Mrs. Charles A. McKenney
Mr. and Mrs. F. D. McKenney
Mr. O. H. M. McPherson
Miss Elizabeth Mills
Mr. Frederick Moore
Hon. Angel Morales, Minister of the Dominican Republic
Mrs. Raymond Morgan
Capt. and Mrs. James O. Murdock
Mr. Denys P. Myers
Mr. Charles Nagel
Mr. H. T. Newcomb
Mr. Herman Ohse
Hon. and Mrs. Robert E. Olds
Hon. J. Rafael Oreamuno, Minister of Costa Rica
Judge and Mrs. Edwin B. Parker
Mr. and Mrs. Robert P. Parrott
Mr. Walter S. Penfield
Mr. Charles Pergler
Miss Elsa M. Peterson
Mr. August Phelps
Prof. Charles W. Pipkin
Hon. Stephen G. Porter
Mr. Jackson H. Ralston
Prof. Jesse S. Reeves
Mr. Thomas E. Rhodes
Admiral W. L. Rodgers

Mr. and Mrs. L. J. Rosenberg
Mr. Justice B. Russell
Mr. A. Sack
Miss Josephine Schaefer
Mrs. Amanda Schlesinger
Mrs. James Brown Scott
Mr. and Mrs. John A. Selby
Mr. Frederic Sevier
Mr. Andrew D. Sharpe
Mr. Andrew R. Sherriff
Mrs. Ruth Shipley
Mr. I. J. Silin
Mr. Kemperer Simpson
Mr. and Mrs. James R. Sloane
Lt. Col. and Mrs. Hugh C. Smith
Mr. L. M. C. Smith
Mr. Stanley P. Smith
Miss Dorothy Somerville
Mme. Luisa Soyez
Mr. and Mrs. Hector G. Spaulding
Prof. and Mrs. Daniel C. Stanwood
Prof. and Mrs. Ellery C. Stowell
Mr. and Mrs. Silas H. Strawn
Mrs. Sidney F. Taliaferro
Mr. Jack B. Tate
The Ambassador of Mexico and Señora Tellez
Hon. Henry W. Temple
Sir St. Clair Thomson
Mr. and Mrs. Edgar Turlington
Prof. Eugene Wambaugh
Miss Sarah Wambaugh
Mr. Sansong F. Wang
Mr. M. Warner
Prof. Royal B. Way
Mr. Mangum Weeks
Mr. Sumner Welles
Mr. C. C. Wertenbaker
Mr. James T. Williams
Mr. and Mrs. William E. Willis
Prof. George Grafton Wilson
Mr. and Mrs. Lester H. Woolsey
Prof. Quincy Wright
Mr. Edward C. Wynne
Mr. Hobart N. Young
Mr. J. Edwin Young

President HUGHES. Bishop Freeman will pronounce the invocation.

Bishop JAMES E. FREEMAN. Almighty God, Our Heavenly Father, we look to Thee as the Giver of every good and perfect gift. Bless this food which Thou has provided to our use and this fellowship to Thy service for Christ's sake, Amen.

President HUGHES. Ladies and gentlemen: I trust that you and our distinguished guests will feel that this is an hour of freedom, of informality, and of relaxation. We have had during the past two days some serious studies, and tonight we abandon the scientific pursuits of Dr. Scott, and the members of his Committee on Plan and Scope, and we burst upon you with what Mr. Dooley calls a "loud annual report." We have had an unusually successful meeting due to the admirable provisions of our program committee.

At the outset we were favored by an admirable address by a distinguished jurist of Canada, Mr. Justice Russell, on the "Status of Canada in International Relations," a most intriguing topic, if I may use a word which is much abused. The conundrum was, "When is an Empire not an Empire," and that was answered by the statement "When it is a Commonwealth of Nations." We were glad to learn, however, that there is still an Empire and that Canada had lost nothing but had gained much, and I am sure that

we all hope that we may have yet closer relations and an opportunity for an increased intimacy with our great and prosperous neighbor to the North.

Then we proceeded to our discussions and devoted ourselves to three topics. Our pure scientists of the American Society of International Law have been brought into very rude contact with realities in this extraordinary enterprise of attempting to codify international law. This has compelled, on the part of our Society, attention to the actual transactions of mankind, and some theoretical conceptions have been brought down to a series of practical applications which have left us much in doubt as to what the law is. We thought we knew what it was, but when we come to close quarters with the actualities of modern conditions we are somewhat nonplussed.

We began, for example, with "Nationality." Why should anyone speak of nationality in a world and at a time distinguished for nationalistic sentiments? It appears that misguided parents, having little regard for the embarrassment of nations and of diplomacy, have inflicted upon their offspring a dual nationality by birth, there being in this respect a regrettable lack of birth control. Having introduced these unfortunate infants into these ambiguous relations, the question is—What is the world to do with them? What opportunities will they have both to exercise rights and to escape duties? The problem is a most serious one and we have debated it, and we have instructed an expert committee to continue the study. This subject is to be taken up at a conference to be held in 1929 at The Hague with the object of codifying international law, and we were quite sure that that conference should not be allowed to remain without our assistance. So we are doing the best we can to throw some light upon that difficult subject.

Then we had the subject of "Territorial Waters," and it was at once pointed out that etymologically that was a very inept expression, and of course with us, in a broad application, the question is not so much of territorial waters as of the extent of territorial aridity. But that presents a very difficult problem and the best minds of our Society are devoted to its consideration.

Then we had as our third subject, the "Responsibility of States for Injuries to Foreigners." I can give you an illustration which we had in one of our meetings which will show some of the difficulties. For example, a letter carrier of a government, of a State, delivers a letter at a house and he kicks a dog belonging to a foreigner who is the receiver of the letter. Now is the state responsible for that injury? It is quite obvious that the letter carrier had no authority from his state to kick the dog. It is also clear that if he had not been a letter carrier he would have had no chance to kick the dog. Now this illustration will at once show you the difficulties that may arise with respect to the police, with respect to soldiers, those in uniform and those out of uniform. Thus you may see that the question of the responsibility of states with respect to the violation of international rights becomes a most difficult problem when you are asking a number of states to come to a definite

agreement as to what responsibility they think they are subject to under the law or what responsibility they should be prepared to assume.

As I have said, we have exhausted ourselves in this scientific endeavor, and we come together tonight to expose our minds to the very agreeable contact with that world of affairs which has been in our imagination during all these days but with which we have had no direct association.

We are continuing here a most happy tradition. As I came into the room, I was presented with a card or program of the first annual banquet of this society held on April 20, 1907, and without mentioning—because I do not wish to bring any grief to you in this hour of pleasure, or what I trust is pleasure—certain very extraordinary foreign descriptions on the *menu*, I turn to the list of speakers and I find that the Secretary of State was toastmaster. That was Elihu Root; that the guests were the British Ambassador, the former Secretary of State, Richard Olney, and General Horace Porter, the dean of all after-dinner speakers and our distinguished Ambassador to France.

Now, following this precedent, the Secretary of State ought to be toastmaster and I ought not to be here at all, but that was the time when the Secretary of State really had very little to do, and I say nothing in disparagement of the high distinction and great ability of the Secretary of that day—we shall always honor him—but he knew nothing of the immeasurable activities of the present Department of State, with its accumulation of notes and despatches which defy the indefatigable efforts of investigators to maintain their reputation for omniscience.

We have persuaded the Secretary of State, however, to join us tonight. We hail his efforts in the cause of peace, but I wish to say that our Society, according to a resolution we have adopted, is perhaps not so much interested just now in peace as it is in *pieces*, that is, these pieces of paper, these numerous telegrams, these instructions, these notes, these papers incorporated, or which should be incorporated, in the books which constitute our "Foreign Relations." We had just before this meeting a conference of law teachers. They are very earnest persons and they want to know what is going on. They want material, not for praise but for criticism. They want the original documents. As a boy was heard to say, "It does wrench a fellow awful to kick at nothing." How is a law professor to register a first class kick when he has not the proper objective?

Now the desire is, and I am sure the Secretary of State will earnestly support us in this effort, to get the documents printed. We need money from Congress. The Department of State is the most poorly paid department in our government. The farmers—God bless them—have bulletins printed on every conceivable subject by the Department of Agriculture which are distributed *gratis*. I should not wish to attempt to define the limits of the activities of the Department of Commerce with respect to the extent of bulletins and of various sorts of information in printed form which come out

from that department and test the superior expertness and facilities of the Government Printing Office. But the Department of State can get but little printed. It is eleven years behind, I think, in its Foreign Relations. Anybody who tries to go through these typewritten press releases, which give you the latest information, will find himself so embarrassed by the form of the material that he would rather not know about it than continue his pursuit. Well, the professors of law met in conference and they resolved, and they have handed their resolution to the American Society of International Law, and we are on the trail of the Budget Director and we are going to conduct a campaign for the purpose of getting a few thousand dollars, just think of it, just a few thousand dollars, so that what is being done can be understood and properly preserved.

I was in office but a short time ago, but I should not care to try to find out what I did. I feel it would be almost impossible. Of course, that is a part of the difficulties of our day on account of the mass of things. We are overwhelming ourselves with papers and books, but we are not overwhelming the professors. They have an aptitude and a capacity for absorbing and dealing with these things which are almost beyond belief. They increase, as Emerson has said, our notion of the capacity of the human intellect, when we think of the subjects which they are able to master and the material in these days with which they feel competent to cope.

All this is to put just a little push behind this movement in the interest of the Department of State and in the interest of public knowledge of the conduct of our foreign affairs. We are one great family in this country, and the only difficulties that the Department of State, I think, really has occur when people do not know the actual truth. When I was in the Department I used to wish that I could get on the roof of the State Department with some kind of megaphone which would reach from the Atlantic to the Pacific and tell everything that I had done, and read every telegram and despatch, and leave it to the American people. The trouble is that they do not know and we need to impart.

Now, we have with us the Secretary of State who is the head of the great Department of Peace. We are glad that he has renounced war as an instrument of policy—we never thought he was actually in favor of war, but now we are perfectly sure that he is not—and he is making a great demonstration for the American people in the interest of peace in this world—a notable contribution on behalf of the people in supporting measures to bind the nations together in a resolve to resort exclusively to pacific measures of settlement.

I have great pleasure in introducing the Secretary of State, Mr. Kellogg.

Secretary of State FRANK B. KELLOGG. Mr. President, Mr. Ambassador, ladies and gentlemen: I am very much disappointed by Mr. Hughes's speech. I was under the impression that when the American Society of International Law came together at a time like this, when the codification of

international law is being agitated and new treaties of peace and so forth are being discussed, that they would quickly agree upon a complete code of international law for the world and settle such questions for all time. If you had any idea how much advice I get on that subject, and how frequently the enthusiasts tell me why this or that should be done, and why we should have a complete code of international law, so that every question between nations could be settled in court no matter what the question might be, you certainly would be as amazed as I am to come here tonight and hear so frivolous a speech on the subject. I get only one comforting thought out of it, and that is that the Society of International Law is going to run the Budget hereafter. I assure you that this will lift a great load from the State Department. I will, however, tell you in confidence one thing, and that is, that I am not so sure that Secretaries of State are always anxious to have the publication called "Foreign Relations" brought down to date. Eleven years softens many things that you do.

I do wish, however, to talk seriously to you for a few moments, seriously because I am not a wit and because I have to talk seriously on this subject to this Society. Frankly, I do not know of any work that would be of greater benefit to the world than for lawyers and statesmen and publicists to turn their attention to the problem of clarifying and codifying the principles of international law, to making the peoples of the world familiar with these principles, and to accustoming nations to the idea of turning to law for the settlement of disputes rather than resorting to the arbitrament of war. The present movement towards the pacific settlement of international disputes has received a great impetus from our realization of the horrors and miseries of the war that lately swept over half the world. Every treaty of arbitration, every treaty of conciliation and every anti-war treaty which denounces war carries us one step further towards the goal of peace, not only because they constitute binding obligations, but because they are an example to the world which carries great moral influence.

We are now negotiating new treaties of arbitration and additional treaties of conciliation with the nations of the world. As you know, on February 6, 1928, the anniversary of that historic day 150 years ago, the Ambassador of France signed a new treaty of arbitration between the United States and France.

We already have conciliation treaties with many South and Central American countries and the question of compulsory arbitration of disputes between American States is to be discussed at a conference to be called in Washington this winter pursuant to a resolution of the last Pan American Conference. In that connection I wish to say that never in his brilliant career has your President performed a greater service to his country than when he was at the head of the delegation at the Pan American Conference in Havana.

Last year M. Briand made a great proposition to the United States, and

M. Briand, the French Ambassador and I are now trying to negotiate a multilateral treaty denouncing war and agreeing not to resort to it for the settlement of international disputes. I wish to pay my sincere tribute to the great ideals and the high-mindedness and patriotism of M. Briand in his work for peace. I also want to pay tribute to the Ambassador who has so loyally coöperated with him. We have different views, to be sure, and if you will bear with me for a few moments I would like to outline the present situation.

There seem to be six major considerations which the French Government has emphasized in its correspondence and in its draft treaty, namely, that the treaty must not (1) impair the right of legitimate self-defense; (2) violate the Covenant of the League of Nations; (3) violate the treaties of Locarno; (4) violate certain unspecified treaties guaranteeing neutrality; (5) bind the parties in respect of a state breaking the treaty; (6) come into effect until accepted by all or substantially all of the Powers of the world. The views of the United States on these six points are as follows:

(1) Self-defense. There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.

(2) The League Covenant. The Covenant imposes no affirmative primary obligation to go to war. The obligation, if any, is secondary and attaches only when deliberately accepted by a state. Article ten of the Covenant has, for example, been interpreted by a resolution submitted to the Fourth Assembly, but not formally adopted owing to one adverse vote, to mean that "it is for the constitutional authorities of each member to decide, in reference to the obligation of preserving the independence and the integrity of the territory of members, in what degree the member is bound to assure the execution of this obligation by employment of its military forces." There is, in my opinion, no necessary inconsistency between the Covenant and the idea of an unqualified renunciation of war. The Covenant can, it is true, be construed as authorizing war in certain circumstances but it is an authorization and not a positive requirement.

(3) The Treaties of Locarno. If the parties to the treaties of Locarno

are under any positive obligation to go to war, such obligation certainly would not attach until one of the parties has resorted to war in violation of its solemn pledges thereunder. It is, therefore, obvious that if all the parties to the Locarno treaties become parties to the multilateral anti-war treaty proposed by the United States, there would be a double assurance that the Locarno treaties would not be violated by recourse to arms. In such event it would follow that resort to war by any state in violation of the Locarno treaties would also be a breach of the multilateral anti-war treaty, and the other parties to the anti-war treaty would thus as a matter of law be automatically released from their obligations thereunder and free to fulfill their Locarno commitments. The United States is entirely willing that all parties to the Locarno treaties should become parties to its proposed anti-war treaty, either through signature in the first instance or by immediate accession to the treaty as soon as it comes into force in the manner provided in Article III of the American draft, and it will offer no objection when and if such a suggestion is made.

(4) Treaties of neutrality. The United States is not informed as to the precise treaties which France has in mind and cannot, therefore, discuss their provisions. It is not unreasonable to suppose, however, that the relations between France and the states whose neutrality she has guaranteed are sufficiently close and intimate to make it possible for France to persuade such states to adhere seasonably to the anti-war treaty proposed by the United States. If this were done, no party to the anti-war treaty could attack the neutralized states without violating the treaty and thereby automatically freeing France and the other Powers in respect of the treaty-breaking state from the obligations of the anti-war treaty. If the neutralized states were attacked by a state not a party to the anti-war treaty, the latter treaty would of course have no bearing and France would be as free to act under the treaties guaranteeing neutrality as if she were not a party to the anti-war treaty. It is difficult to perceive, therefore, how treaties guaranteeing neutrality can be regarded as necessarily preventing the conclusion by France or any other Power of a multilateral treaty for the renunciation of war.

(5) Relations with a treaty-breaking state. As I have already pointed out, there can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state. Any express recognition of this principle of law is wholly unnecessary.

(6) Universality. From the beginning it has been the hope of the United States that its proposed multilateral anti-war treaty should be world-wide in its application, and appropriate provision therefor was made in the draft submitted to the other governments on April 13. From a practical standpoint, it is clearly preferable, however, not to postpone the coming

into force of an anti-war treaty until all the nations of the world can agree upon the text of such a treaty and cause it to be ratified. For one reason or another a state so situated as to be no menace to the peace of the world might obstruct agreement or delay ratification in such manner as to render abortive the efforts of all the other Powers. It is highly improbable, moreover, that a form of treaty acceptable to the British, French, German, Italian and Japanese Governments, as well as to the United States, would not be equally acceptable to most, if not all, of the other Powers of the world. Even were this not the case, however, the coming into force among the above-named six Powers of an effective anti-war treaty and their observance thereof would be a practical guaranty against a second world war. This in itself would be a tremendous service to humanity and the United States is not willing to jeopardize the practical success of the proposal which it has made by conditioning the coming into force of the treaty upon prior universal or almost universal acceptance.

Some people have said I was an idealist. Well, I do not think any man can accomplish any great work unless he is something of an idealist. Others have said that I was impractical. Well, perhaps I am although I have had to solve many practical questions in the more than seventy years I have lived and in the course of my work I have knocked around a good deal. I firmly believe, however, that since the last great war the attention of the peoples of the world is being irresistibly drawn to the ideal of peace, and the time may well have arrived when the leading nations can at last solemnly renounce war and through such renunciation and the conclusion of treaties of arbitration and conciliation come nearer than ever before to a realization of mankind's dream of world peace.

President HUGHES. We are greatly in debt to the Secretary of State for making our banquet the occasion for this authoritative pronouncement to which attention will be given throughout the world. We are sorry that he is compelled to leave, but he has to attend another dinner where frivolity is welcome.

We wish him success in his great effort for, after all, I have become convinced that it is not so much what we write, or what we put on the statute books or in treaties, that counts as it is the spirit which animates us, and if this proposal is accepted it will be fresh evidence of the spirit in the world to this time which is intent upon the renunciation of war.

The scientists of international law, to whom I have alluded, look upon diplomacy very much as our Puritan forefathers looked upon sin. It was an essential feature of their system and it had a constant fascination for them. There is nothing that our pure scientists like so much as to come in contact with a real diplomat. We talk of the better understanding of peoples, they ask for a better understanding of diplomats. We have a very high privilege tonight in welcoming the Ambassador of our country's life-long friend, the representative of a great people whom we admire for their culture, their

technical skill, their manfiold contributions to the resources of our civilization. But our distinguished guest is more than an ambassador, he is a poet. Now even an ambassador, like other diplomats of lower rank, is of the earth; earthy, but the poet is of heaven.

> "The poet in a golden clime was born
> With golden stars above,
> Dowered with the hate of hate, the scorn of scorn,
> The love of love."

If you could have all diplomatists, all ambassadors with that spirit, all our troubles would be solved.

His Excellency, the French Ambassador.

Ambassador PAUL CLAUDEL. Mr. Toastmaster, ladies and gentlemen: You all remember the Greek fable of Hercules arriving one day at a certain place where two ways were offered to him. At the entrance to them stood two ladies, both equally beautiful and enticing, Vice and Virtue. You know the choice of Hercules. As says the French poet, "*Il suivit la Vertu qui lui sembla plus Belle.*"

Diplomacy finds herself today in the same somewhat embarrassing situation. For many centuries, with more cunning then Hercules, she has tried to follow not only one of the self-offered leaders, but both of them at the same time. One is Mars and the other is Law. With Mars she had contracted a long if somewhat disreputable acquaintance. But of late the fellow has become quite impossible. He has covered himself not only with blood but with shame, and decent people who were indulgent to his vagaries now consider him with the same disgust which attaches to vulgar brawlers, to inveterate and half-mad drunkards. And so Dame Diplomacy turns an inquiring and somewhat diffident eye towards her new partner whose name is Law. As you know, Greek fables are very particular about genealogies. And in that way we are told that Law is the daughter of Justice. Justice is depicted as blind, but Law is not blind, she is only lame, which is a very reassuring proposition. As you are well aware, when there is some difficulty between private persons, if you cannot settle it on the spot, you have only to wait, and the difficulty is settled by itself. In that way judicial litigation was substituted for the old time mood of decision by the sword, to the entire satisfaction of everybody, especially of lawyers. Then why should we not introduce among nations proceedings which have so well succeeded among private persons? Every lawyer knows there is a just and peaceful way out of any entanglement, but when you cannot settle it the resource remains always to postpone it, if possible, to Doomsday, which is much better than to fight. That's what I mean when I say that lameness of Law is a somewhat reassuring proposition.

And since we are in Greece, my mind is attracted by another classical souvenir. You remember that beautiful drama of Aeschylus where Eumen-

ides, the dark deities of contention and anger, are little by little softened and assuaged by the Goddess of Wisdom, Athena, and instead of being a curse upon the country, are brought to take place among its protective powers. Nobody was more pleased than France to see her American sister take the rôle of the wise Athena. France is the power which has suffered more from war and America is the power which can do most for peace. It was only natural and proper that both countries join their voices in an effort to tame the wild Erinyes of hate and destruction. Just as American Independence and French Revolution were the base of national liberties and democratic rights of man, just as well the traditional and disinterested friendship between the two Republics is at the same time the origin and the model of the bond which is to tie all the nations of the world. And in no better place than among the members of this American Society of International Law, which has done so much for making ideas from things which were only ideals, for transforming mere feelings into clear and sensible propositions, may I pay my tribute of acknowledgment to the two good and great men who did so much with a straightforward mind and an honest will for promoting the idea of a Law among nations, I mean a Law not of strength, but of justice and free will, to President Calvin Coolidge and to Secretary Frank Kellogg. Theirs is the glory, not of conquerors, but that glory which is expressed by the solemn and everlasting words: Blessed are the Peacemakers.

President HUGHES. I am sure you would have me express to the French Ambassador our very deep appreciation of the honor which he has done us in coming here and our gratitude for the privilege of listening to his eloquent address.

I spoke a moment ago of our problem of dual nationality acquired at birth. But we have another problem of nationality, which is due to certain voluntary contracts which are entered into without much regard for political consequences. I refer to the contracts of marriage. Our ladies have recently found that against their will, while they thought they were making an absolutely free choice, they were becoming citizens of other countries while they desired to retain their citizenship in the country of their birth. They, therefore, procured an Act of Congress to cure this defect, which has resulted in more complications than those that usually attend matrimonial arrangements and has left some of our sisters with no nationality at all.

Now we have the problem as to what we should do with this situation in the codification of international law. We had a very learned *rapporteur* on the subject, a recognized authority. I would not misrepresent him, but I think when he got through with a very interesting paper the substance of his point was, "What do the women want?" I thought that was a very sensible conclusion for even in the realm of codifying international law, when it comes to the rights of women, what they want they will get.

The next speaker represents in a very superior way the recognition of

the rights of woman in our favored land. Not only that, she represents a beautiful tradition of interest in our foreign relations, for it was her husband, whose memory we honor, who had so much to do with the promotion of the bill improving the organization of our foreign service, and I am happy to know that that interest is maintained in a most effective way.

I have great pleasure in introducing to you Mrs. Rogers, Representative in Congress from Massachusetts.

Mrs. EDITH NOURSE ROGERS. Mr. Chairman, Mr. Ambassador and international lawyers and the women who—Mr. Hughes tells us—do not know what they want: I am going to talk about what one woman wants, and that is the best foreign service in the world, and you must help me secure that by asking Congress to legislate for that goal and members of Congress can not possibly know what you want unless you know yourselves and ask us.

Perhaps I was invited to talk to you tonight because women are now in the foreign service. Women are still a good deal of a problem to the Department of State. I understand that the Department feels that it can not send them to foreign countries as consuls because they will have to deal with drunken sailors. Recently a very inebriated gentleman came to my office and there was no difficulty in sending him to the Department where he had a claim to take up. I believe if your women that go out into the field in the foreign service have to deal with drunken sailors, they will do it and will perform every other task that comes to them, and surely most of the Consul's clients are not drunken sailors. I believe the women in the foreign service will be accorded the same treatment as the men,—just as the women members of Congress are treated by the men,—like another man. Men show a certain courtesy towards women that they will always show, and you can not prevent them from so doing. In Congress, they will fight a woman just as hard if she proposes a measure of legislation that they do not wish to have passed, as they will a man, and that is only to be expected.

I am going to make a plea to you tonight to please become interested in securing appropriations for our first line of defense, and that is, of course, our foreign service. You know that armies and navies do not make war, they stop war, and it is our duty to provide an adequately trained foreign service to prevent if possible by intelligent diplomacy, those men for the most part too young to die, men too young to be mutilated for life, from being sent to fight for us. You know that wars have been averted by skilful diplomacy and that wars have been made by bungling diplomacy.

I am going to tell you what I consider is a joke and also a reflection upon the State Department, and it reminds me a little of a Member of Congress when he does not want to answer his constituents as to his vote upon a certain measure. Early in the week I asked a member of the State Department a question. A State Department official came to the Capitol and tried to see me twice and late that afternoon another official told me that

I would not receive my answer until the following week, because the Assistant Secretary of State who was handling that matter happened to be away.

When international lawyers believe that the Department of State ought to have more money to operate that Department efficiently, to have the men in office who are qualified to be there, to pay trained lawyers, trained administrators an adequate salary, then, we are going to have just the kind of service that we ought to have; and if you are only willing to become sufficiently interested in the measures before Congress that will help the Department of State, Congress will pass those measures. You can help more than you know. A well-run Department is a matter of administration, not legislation. A good administrator can not be legislated, but an adequate salary margin attracts the efficient man into the government service.

I happen to be a member of the Civil Service Committee. Before that committee, early in the week, a measure was brought to our attention raising the salaries of the civil service employes in Washington. Unfortunately, the majority of the committee took out of the bill before the bill was passed in the committee four higher grades, Grades 7 and 8, and Grades 15 and 16 in all the Government Departments. I know the members of the committee, at least I feel sure that they did not quite realize when they voted against those new grades exactly what they were doing, and it is my hope that that provision will be reinstated when the bill is recommitted to the committee. And if you want to do something constructive—I feel like lobbying for the bill, and it is not my bill, so perhaps I may do it—you can interest your own members of Congress in seeing that those provisions go back into the bill. The bill provides for an increase from $7500 to $9000 for these grades. It increases the pay of the assistant secretaries, increases the pay of the professional and scientific personnel, of the lawyers and of the administrators who should certainly receive a higher salary.

As you know, the Act to reorganize the Foreign Service provided that there should be an interchange of the consular and the diplomatic officers, that the consuls should be sent out as diplomats at times, and the diplomats as consuls. It is very amusing to those of us who have watched the working out of the bill that apparently all the consuls want to become diplomats and the diplomats are all very much like the oyster in "Alice through the Looking-glass." Perhaps you may remember that when the carpenter and the walrus invited the oyster to take a walk on the sand,

> "The eldest oyster winked his eye
> And shook his heavy head.
> Meaning to say he did not choose
> To leave his oyster bed."

While the interchange of consuls and diplomats was provided for in the Rogers Act, it is to me manifestly absurd to believe that all consuls are fitted

to be diplomats and *vice versa*. At the present time even the casual observer will realize, if he stops to consider, that some of the consular officers have had little training in diplomatic work, and some of the diplomats are totally unsuited for consular work. It was not the purpose of the Rogers Act to transfer unequipped officers to either service, but to make transfers possible and to provide an all-round training for both consular and diplomatic work. Of course, you must have a fair proportion of promotions, and the lack of promotions in the consular service during the past few years is rapidly being rectified.

I am going to introduce a few amendments to the Rogers Act which I hope will be constructive amendments and not any that the Department might feel an impertinence. I was asked last summer if I would introduce a certain bill in Congress. A man said that one of his friends had saved his wife from drowning and he felt that that man should be given a Congressional medal of honor. As a rule the men enjoy that story more than the women. But if I tried to pass a measure in Congress that would hurt the Foreign Service of the State Department, instead of helping it,—well,—I think I ought to drown!

Armies and navies do not make war, they stop war. Issues of peace or war hang upon diplomatic negotiations. It is because the need for a thoroughly equipped foreign service is so great, I have chosen that subject this evening, and because I believe the international lawyers can do so much to spread the Gospel of Foreign Service preparedness. Lawyers know the importance of able legal minds to assist in treaty making. Our distinguished Secretary of State, Mr. Kellogg, will go down into history for his great treaty work. It will not be forgotten.

Mr. Average Citizen thinks and cares very little about the difficulties surrounding the foreign service officer. The foreign service officer is in a foreign country, often in a country that is trying climatically, where he must speak a foreign language. He has no home surroundings for a background. He must decide quickly matters of great moment to his country. He must keep on the most friendly terms with the country to which he is accredited. He must be on friendly relations with diplomats and consuls of other countries. He must learn what they are doing, if they are treating America with proper respect, if they are allowing hostile propaganda to be circulated about. He must, with the assistance of the Department of Commerce attachés, try to secure for the United States our fair share of trade. He must keep this country informed as to every international problem that may arise at his post.

Since the middle of the nineteenth century, international commerce has increased steadily and with amazing rapidity until the opening of this century when it reached its peak. Today, it is hardly too much to say that every farmhouse, every hamlet, every city block is connected by invisible but very real economic bonds with hundreds of other cities, towns and ports

in every corner of the globe. We have trade lines all over the world. Today, a nation's foreign relations consist basically and primarily of business negotiations between citizens and foreign traders, of the commercial, travel, or pleasure journeys undertaken by its citizens abroad, or deals with investments made and property owned by its citizens, and educational or charitable institutions established by its citizens in foreign countries.

Out of the multiple and complex relations between individuals has arisen the real need for all governments to have a ministry of foreign affairs,—a State Department. National economic interests make modern diplomacy an absolute necessity. Time was when to be in trade was considered almost degrading, but since then love of comforts and luxuries has become greater, and people that thought trade vulgar have taken it up only too gladly. Trade and commerce have democratized and altered national policies. To have commerce run its course in a satisfactory way, peace is essential. It is easy to see that war upsets a country's whole economic structure. Industry and agriculture struggle to expand to meet the war-time demand for certain commodities, only to find the readjustment period after the war trying in the extreme.

The policy of a nation like our own should always be to open every avenue to world trade and to encourage world disarmament, but always to be as well prepared as any other country,—prepared by foreign service, prepared by the army, prepared by the navy, prepared by aviation, prepared industrially and prepared agriculturally. Our illustrious Chairman, Mr. Hughes, has called the Department of State, "the Department of Peace." Last year at the time of the internal family squabble about promotions, it seemed to be a department of peace with foreign countries rather than one of peace at home.

It was in order to secure adequate foreign service that the Rogers bill was first introduced. In spite of some of the very able Secretaries of State and ambassadors and ministers that our foreign service had before the World War, the outbreak of that terrific conflict found their first line of defense—which is our foreign service, unprepared. The eyes and ears of our foreign service had proved inadequate, and, as Secretary of State Lansing wrote in advocating legislation to improve the foreign service: "The European War came upon the United States in 1914 as a surprise chiefly because its Department of State through inadequate equipment had been unable to gather information and interpret it in a manner which would reveal the purposes of the governments by which hostilities were precipitated. . . ."

It is hard to understand why a realization of the need of a well-trained service was not more generally felt by the American people. Diplomacy defends its country by brain power, not by machinery of war or by battleships. It ought to follow then, that a wise nation like our own, considering the enormous importance of our goal, will make every effort to send as far as it is humanly possible, as representatives to foreign countries to carry on our

nation's great business, men that are fully equipped. Our foreign service officer should be a man of education and of much ability. He must possess an attractive, pleasing personality, and must be smart enough to know what the underlying policies of other countries really are, to size up situations. He must not be totally blind to what is going on in foreign countries. In these modern days a foreign service officer, if he does his work satisfactorily, does not have a bed of roses. We are more prosperous than any other country at the present time. Countries are very jealous of those more prosperous than they. Countries will always fight for supremacy in commerce and for supremacy along every line of activity.

At the present time, certain members in the diplomatic service will tell you that the cream of the service is among the diplomats and, there are certain consuls who will tell you that the cream of the foreign service is in the consular part of the service. The truth is that there is cream in both branches of the service, and there is also skimmed milk. It is always easier to see the faults of a department than to see its virtues. In view of the financial handicap, I am amazed that we have had such a creditable foreign service. The Department even under the Rogers Act is forced to operate at a very small cost.

In speaking of the needs of the reorganization of the foreign service, the author of the Rogers Act said in 1924:

> Up to this time, we have kept the diplomatic side of our foreign service and the consular side of our foreign service in two water-tight compartments. There was a theoretical possibility of appointing a diplomat to consular work, and *vice versa*. In practice, the interchange was never effected. It was only about 25 years ago, that the question of inter-changeability became important. It has only been since the time of the Spanish American War that the United States has become a world power. Before that time, speaking very generally, questions of international trade were separate and distinct. It was perfectly proper, perhaps, in those days, for the diplomatic corps, dealing with international politics on the one hand, and for the consular corps dealing with international business on the other hand, to be distinct and to be kept apart in water-tight compartments.

This Act does away with the water-tight compartments and welds together the two branches of the service. The following changes have also been brought about:

1. It broadens, democratizes and improves the personnel by extending the field of selection.

2. It enables the entrants into the service to become thoroughly grounded in diplomacy, and it teaches them to carry on the nation's business to the advantage of themselves and their country.

3. It tends to diminish the snobbery which occasionally is found in the service. A secretary today may become a consul tomorrow, and *vice versa*. The *esprit de corps* will be for our foreign service as a unit.

4. It provides a reasonable living wage which, besides being democratic, tends to keep the right man in the service even though he has no private means.

5. It simplifies and improves administration by enabling the right man to be instantly available for the right place.

6. It encourages the President to promote the best foreign service officers whether diplomatic or consular, to the rank of minister. Under the far-seeing administration of Mr. Lansing and Mr. Hughes, promotions of secretaries to the rank of minister were frequent, but there was scarcely an instance in 25 years where a consul general had been so promoted, and Mr. Kellogg has made still more promotions.

7. It reduces from about thirty to nine different types and grades of foreign service. This nullification spells simplicity in administration without any countervailing inconvenience. I believe the number of grades can be made even fewer.

8. All this has been brought about at an additional outlay of about $300,000, less than one per cent of the cost of a vessel of war. When you contrast this with the millions spent in the Army and Navy Departments as peace insurance, and realize that the foreign service is the only articulate voice the United States has beyond the three-mile limit, you must all agree that larger appropriations should be made to give us a better foreign establishment.

While our foreign service can be improved, there is much that is good in it, and very fine work has been done that has gone unheralded. It is much easier to destroy than to construct, and we all know, in spite of the many jokes at the expense of our "silk-hatted and spatted diplomats," that real ability is hidden beneath those silk hats. What difference does it make if they do or do not wear spats and silk hats? I am more interested in what they wear inside their minds. Nothing gives me greater pleasure than to talk to men, both diplomats and consuls, who are giving to the United States of America the very highest type of unselfish service. And when you contrast the work and general availability of the ministers who have been promoted in the foreign service with the political appointees of the past, one ought to be very grateful that it has been possible to promote career men in the service to be ministers and ambassadors.

Under the present Act, for the first eight years, the government has effected the most complete fusion of the consular rôle and the diplomatic rôle. All entrants into the service have six months' intensive training in the Foreign Service School. They then are sent to their foreign posts as vice-consuls.

In trying to reorganize the foreign service of Italy, Signor Dino Grandi, Under Secretary of Foreign Affairs, said in speaking of the young Italian just entering the foreign service: "One enters the Ministry of Foreign Affairs only by the side door—the Consular door." One can not become a

good diplomat without having been a very good consul. It is interesting that the Italian Government is obviously trying to copy our foreign service.

Another step in the right direction was the passage in 1926 of the Porter bill. This bill provided that a certain sum of money be expended for the purchase of embassies and legations. It is only suitable that this government should own its own buildings. In the past many of our embassies and legations have been a disgrace to this country, they were so entirely inadequate. Other countries have always owned their embassies and legations. American-made furniture, china, glass and draperies are being purchased for the American buildings. There is no reason why we should not have a style of our own instead of copying that of other countries. There is no reason why we should not have a protocol of our own. Occasionally, a diplomat speaks of the customs of kings and queens as if they should be followed in this country.

President Theodore Roosevelt said in his autobiography:

> The American public surely appreciates the high quality of the work done by some of our diplomats—work usually entirely unnoticed and unrewarded, which redounds to the interest and the honor of all of us. The most useful man in the entire diplomatic service during my presidency, and for many years before, was Henry White.

Mr. White was an inspiration to young and old. A Frenchman said in speaking of Mr. Henry White: "Mr. White does not act as though he considered foreign diplomats robbers and thieves even if he believes that we are, and when he has any suggestions to make, we like to follow them."

At the present time, with all the international diplomatic activities, with the increased possibilities for world trade, it seems to me there can be no more fascinating career or a larger field for service for young men than that of foreign service officers. But they must learn the real meaning of service to others, and not service to themselves in foreign countries. If they go forward in the spirit of Lindbergh, the spirit of America, that gives all unconsciously, in order to serve we shall have the most wonderful foreign service that was ever known.

President HUGHES. If we only had our hats on, I am sure we would take them off to Mrs. Rogers. I think that the Department of State will be well advised to keep on the right side of Mrs. Rogers.

I do not know what that question was that was put to the Department, but in my day I have seen questions and conundrums put which would make all the assistant secretaries, and the secretary himself, wish to leave town for a considerable time.

Our last speaker is the oldest friend of the Society. The Society is young enough to enable me to express this thought, without suggesting a degree of venerableness which might possibly be regarded as offensive. He has been our mentor, our energizer, our constant supporter from the

beginning, and he has now essayed a new task, to inject a new serum into our organization so that we will have a more pronounced vitality.

I had the great privilege of being associated with him at the Havana Conference. We were in daily contact and I can testify not only to his learning, of which you know so much, but to his constant friendship and his inimitable tact. As I would drive into Havana every morning from my hotel—which was some distance out of the city—disconsolate, weary, wondering what in the world was going to happen, I would see some of these great advertisements, with which we are familiar in this country, and I would notice this striking sign—"Use Scott's Emulsion." I at once took heart and I knew that, if we had anything to administer, the dose would be a palatable one.

I cannot say too much in appreciation of his many services, not in the interest of this Society alone, but in the development of international law. We shall have great pleasure in hearing from him tonight—Dr. Scott.

Dr. JAMES BROWN SCOTT. They say, Mr. Toastmaster, Ladies and Gentlemen, that there is a reason for everything, and I am obliged to suppose that there is a reason for inviting the guests seated at the speakers' table this evening. They were, I understand, to speak, and it was therefore necessary to find three or four gentlemen—including a lady, Mrs. Rogers—willing to submit themselves to the ordeal of addressing this learned and critical audience, and to make some remarks more or less appropriate to the occasion. There may be another and a particular reason in my case, inasmuch as I suggested, many years ago, the formation of this Society, and thus, in a way, inaugurated the annual dinners. For more than twenty years, I have listened and passed judgment upon the efforts of others; and I venture to express the hope that the members and the guests of the Society will be able to stand the ordeal as I myself have done throughout a generation.

The American Society of International Law has exceeded our fondest expectations. It has been able to hold its meetings from year to year, and to publish a *Journal of International Law* which has appeared for the past twenty years—a little behind time in the earlier days, but now, especially since my connection with it has become purely honorary, on time. At any event, it is impossible to pick up a book on international law, and probably on international relations, which does not contain some reference to the Society, its *Journal*, or even its *Proceedings*. It is still the only journal of international law of the English-speaking world; indeed, I have heard it said by others than its editors, that it is the best in any language.

However, I should not dwell longer upon these matters which are as common knowledge, and which, as you know, are the contributions as well as the pride of the Society. I have thought that I might avail myself of this occasion, not to compete with the Toastmaster, for competition would be impossible, in his "Outlook on Panamericanism," but rather to say some-

thing of these international conferences which are of such frequent occurrence that the nations are in danger of acquiring the habit of meeting at regular, instead of irregular intervals, in order to exchange views and, unconsciously it may be, to advance our common civilization by their gatherings.

An international conference meets in an atmosphere of expectation. Those who are not connected with it generously supply it with a program. It should do this; it should do that. And as it has a way of its own, it generally adjourns in an atmosphere of shattered hopes for those who do not find in its labors the realization of their cherished dreams. This is natural enough, for they think in terms of their own lives, whereas nations are long-lived and move as if they had, as indeed they do have, the whole future before them.

A conference, however, does something. The late Mr. Adee, of the State Department, who had had larger experience than any of us in such matters, was accustomed to say that you might be sure of one thing; a conference will never carry out its program, although it will do something. And it is because of these conferences meeting from time to time and "doing something" that the world is gradually being subjected to the rule of law, instead of the arbitrary application of force.

I wonder if it would be presumptuous on my part to draw somewhat upon an experience had with international conferences, co-terminus with the formation of this Society?

The American delegates are supposed, sometimes, to be appointed with reference to the program, and they spend the first days of their mission with their fellow-delegates (likewise supposed to be appointed with some reference to the conference) in getting acquainted. This is a pleasing process. Everybody abounds in good will and in good nature, and the conference already appears to be a glorious success before it has begun its labors. Everybody is in favor of everything, especially his own plans.

The second phase begins when the conference settles down to the daily task. Then optimism gives way to a feeling of depression. Our individual plans are presented and, while they should be accepted, the plans of our erstwhile friends stand in the way. We had counted upon their friendliness, not upon their opposition. This is human nature, and the other delegates have the same "brand," whatever be their nationalities; and thus it is that from day to day, and week to week, the barometer of our hopes is falling, falling, falling. Even the most optimistic begins to wish that he had stayed at home. We begin to look upon the adjournment of the conference as our only hope.

They decide that the conference shall adjourn on such and such a day. Immediately it enters upon its third and final phase. A change is noticed in the barometer, the mercury has steadily risen, the atmosphere is clearing, and optimism, so long banished, appears again in our midst. The delegates,

singly or collectively, agree that but little can be done in the closing days; that projects which have been presented and produced irritation instead of agreement, are to be relegated to a future conference. This is the first rift in the clouds. There is to be a future conference, and to it projects which the delegates have been unable to handle are to be referred. Whatever the conference itself may do, it has, in providing for a successor, deserved well of the future. It is next agreed that some projects which have not produced irritation might be taken up and passed. Here is a present gain. Then in the newer atmosphere of friendliness and of consideration which has made its appearance, a new project is introduced here and there, and is adopted amid good will, in the closing days of the session.

What has worked this miracle? Human nature; the feeling on the part of each delegate that he could not return empty-handed. Much has been attempted, something has been done, and Mr. Adee on this occasion, as on so many preceding ones, has been proved a prophet.

"Something attempted, something done,
Has earned a night's repose."

The delegates meet in the closing session of the morrow as they had gathered before the formal opening of the conference, and in the early days of hope and expectancy. They abound in expressions of good will. They are so glad to have made the acquaintance of their distinguished colleagues from other countries, and they adjourn in the belief that the conference was a success. By their commendation they endeavor to make it so.

I have already said that I would not seek to enter into competition with the Toastmaster. I have not said a word about the future of Panamericanism, and I do not intend to break my pledge in the last word which I have the honor of addressing you. I shall only say that the Pan American Conferences are no exception to the general rule, and that the application of the general rule to the Sixth International Conference of American States, held in the city of Havana from the 16th of January to the 20th of February of this year, was mightily facilitated by the presence of the Toastmaster of the evening as chairman of the delegation of the United States.

President HUGHES. Before we adjourn, let me say that the committee that was appointed today to take into consideration some changes in the arrangements for future meetings has made a report. I shall not read it in detail, but I may mention that it is proposed that next year we shall meet on Wednesday instead of Thursday evening; that we shall have two full days for scientific study, for papers and debate, and that we shall have two evening sessions of a less technical and more general nature, thus enabling the Society to fulfill both its scientific and cultural purposes. On Thursday and Friday evenings special papers on topics of general interest will be presented and matters discussed which will, it is hoped, interest the public. We feel that we are beginning over again, and that next year we will have a

more important meeting than any we have had in the past. There is no reason why this Society, meeting in the capital, dealing with international law, should not be the center of a very wide and intelligent interest.

With that hope for the future, with an expression of great satisfaction with the present, and with renewed tribute to our speakers who have graced this occasion, I suggest that we depart with a happy vision of that future when the world will be governed by law, not by lawyers, and by a sense of international justice which will make the services of international lawyers but little needed.

MINUTES OF THE EXECUTIVE COMMITTEE

November 22, 1927

Pursuant to the call of the President, the Executive Committee of the American Society of International Law met in the office of the Society at No. 2 Jackson Place on Tuesday, November 22, 1927, at 2.30 o'clock p. m.

Present: Mr. Edwin B. Parker, Chairman; Mr. Chandler P. Anderson, Mr. William C. Dennis, Mr. George A. Finch, Mr. Charles Noble Gregory, Mr. Robert Lansing, Mr. Frederic D. McKenney, Mr. Ellery C. Stowell, Mr. Lester H. Woolsey.

Letters of regret were received from Mr. Charles Evans Hughes and Mr. W. W. Willoughby.

The Committee first considered the question of the continuance of the Committee for the Extension of International Law, which was referred to the Committee by the Executive Council at its meeting on April 30, 1927. It was, upon motion of Mr. Lansing seconded by Mr. McKenney and duly put and carried,

> *Resolved*, That the Committee for the Extension of International Law be, and the same is hereby, discharged, with an expression of thanks for its services.

The Committee next considered the issuance of a Special Supplement to the *American Journal of International Law*, as recommended by the Managing Editor and approved by the Editor-in-Chief, to contain a continuation of the documents of the League of Nations Committee for the Progressive Codification of International Law, the projects adopted by the International Commission of Jurists at Rio de Janeiro in May, 1927, and the resolutions adopted by the Institute of International Law at its meeting in Lausanne, Switzerland, in the summer of 1927. After full consideration and discussion, the Executive Committee adopted the following resolution:

> *Resolved*, That the Board of Editors of the *American Journal of International Law* be, and it is hereby, authorized to publish as a Special Supplement in whole or in part, as it may deem to be advisable, the documents emanating from the League of Nations Committee for the Progressive Codification of International Law in continuation of the documents published as Special Supplements in 1926, the projects adopted by the International Commission of Jurists at Rio de Janeiro in May, 1927, and the resolutions adopted by the Institute of International Law at its meeting in Lausanne, Switzerland, in the summer of 1927.
>
> *Resolved further*, That, in view of the inadequacy of the funds at the disposal of the Society, the Board of Editors be, and it is hereby, requested to approach some appropriate agency with the object of obtaining funds to defray the cost of issuing such a Special Supplement to the *Journal*.

The Treasurer reported that the Transfer Agent of the Potomac Electric Power Company of Washington, D. C., had held to be insufficient the power of the Treasurer to sell four shares of stock held by the Society in that corporation. The Executive Committee therefore adopted the following resolution to clarify the power of the Treasurer:

> *Resolved*, That the Treasurer be, and he is hereby, authorized to sell the four shares of preferred stock of the Potomac Electric Power Company now owned by the American Society of International Law, and to reinvest the proceeds of the sale in such other securities as the Treasurer of the Society may select.

In this connection, the Executive Committee deemed it expedient that the Treasurer should have full power to deal with the Society's securities without obtaining specific authority in each case, and, after careful consideration, the following resolution was adopted:

> *Resolved*, That the Treasurer be, and he is hereby, authorized and directed to keep any and all funds which may be now or hereafter deposited in the Society's savings account, invested in substantial securities, and he is hereby authorized, in his discretion, to sell any securities now in his possession, or which he may hereafter in any manner acquire, and to reinvest the proceeds of such a sale or sales in such other securities as he may select.

The Managing Editor submitted communications from the President of the Lancaster Press, Lancaster, Pennsylvania, dated September 29, October 11 and 28, and November 8 and 21, containing an offer for the publication of the *American Journal of International Law* at an apparent saving of a considerable sum under the present publishing contract with the Rumford Press. At the same time, the Managing Editor reported that he had ascertained from Dr. J. Franklin Jameson, the Editor of the *American Historical Review*, which is published by the Lancaster Press, that the Lancaster Press has given the editors of that *Review* entirely satisfactory service and that it seems to be responsible in every way and to live up to its agreements. The Managing Editor further reported that the present publishers, the Rumford Press, were giving better service than any previous publisher of the *Journal*, and were satisfactory in every respect. Under the circumstances, the opinion was expressed that the Rumford Press should be informed of the offer received from the Lancaster Press and given an opportunity to meet it either in whole or in part. After discussion, the following resolution was adopted:

> *Resolved*, That a special committee consisting of the Editor-in-Chief and Managing Editor of the *American Journal of International Law* and the Treasurer of the American Society of International Law be, and they are hereby, appointed with full power to act in the matter of the publication of the *American Journal of International Law* either by continuing with the Rumford Press the present contract or the present contract with modifications, or by concluding a new contract with the Lancaster Press, should such a new contract, after full consideration, be deemed by the special committee to be desirable.

The Corresponding Secretary suggested the issuance of an up-to-date pamphlet, describing the Society and its publications, for use in correspondence with prospective members. After consideration, the Executive Committee adopted the following resolution:

> *Resolved*, That the Executive Committee hereby authorizes the expenditure of sufficient funds from the Treasury of the Society to pay for the issuance of a circular or pamphlet describing the Society and its publications for use in connection with obtaining new members.

There being no further business, the Executive Committee adjourned at 3.40 o'clock p. m.

GEORGE A. FINCH,
Recording Secretary.

Approved:
EDWIN B. PARKER,
Chairman.

MINUTES OF THE EXECUTIVE COUNCIL

Friday, April 27, 1928

The Executive Council of the American Society of International Law met at No. 2 Jackson Place, Washington, D. C., on Friday, April 27, 1928, at 4.30 o'clock p. m.

The meeting was called to order by the Honorable Charles Evans Hughes, President of the Society.

Upon roll call, the following members were present:

Chandler P. Anderson	William I. Hull
Hollis R. Bailey	Charles Cheney Hyde
Philip M. Brown	H. T. Kingsbury
Charles Henry Butler	Arthur K. Kuhn
William C. Dennis	Robert Lansing
Edwin D. Dickinson	Chester I. Long
Jacob M. Dickinson	Frederic D. McKenney
George A. Finch	Fred K. Nielsen
Richard W. Flournoy	Edwin B. Parker
Harry A. Garfield	Pitman B. Potter
James W. Garner	Jesse S. Reeves
Charles Noble Gregory	James Brown Scott
W. O. Hart	Ellery C. Stowell
David Jayne Hill	Thomas R. White
Frank E. Hinckley	George Grafton Wilson
Charles E. Hughes	Lester H. Woolsey

A letter was presented from Mr. Frederic R. Coudert expressing regret at his inability to be present on account of his absence from the country.

The minutes of the meetings of April 29 and 30, 1927, which had been previously printed in the *Proceedings* and distributed, were approved.

The Recording Secretary and the Corresponding Secretary made oral reports in regard to the conduct of the business of their offices during the year. From the report of the Recording Secretary it appeared that the following was the status of membership in the Society and subscriptions to the *American Journal of International Law:*

New members since April, 1927	104
Life members since April, 1927	2
Honorary members since April, 1927	1
Resignations since April, 1927	32
Members dropped for non-payment of dues	28
Deaths since April, 1927	17
Total membership of the Society	1,273
New subscribers since April 28, 1927	103
Discontinued	67
Net gain	36
Total subscribers	1,017

The Treasurer submitted a written report which, after reading, was approved and ordered to be filed. It is appended hereto.

The Treasurer also submitted a report from Messrs. Price, Waterhouse & Company, showing the result of their audit of the Society's accounts for the year ended December 31, 1927. The report of the auditors was read, received, and ordered to be filed.

The Editor-in-Chief reported that, as the result of the submission of an offer of publication from the Lancaster Press, a reduction of ten per cent in the publication of the *Journal* by the Rumford Press had been brought about. This offer of the Rumford Press, he stated, brought the cost of publication down to approximately the offer of the Lancaster Press, and allowed the Society to retain the high quality of workmanship and service rendered by the Rumford Press.

The Editor-in-Chief then reported that he had received the cordial cooperation of the members of the Board during the preceding year, and that the *Journal* had retained the high standard of previous years. He further reported that the Board of Editors had adopted a rule that each editor would be expected to contribute the equivalent of at least two editorials a year to the *Journal*, and that any editor who failed to comply with the rule would be subject to replacement. The Board had also adopted, he reported, a rule under which a detailed report would hereafter be submitted to the Council by the Editor-in-Chief.

Finally, the Editor-in-Chief called attention to the Special Supplement which accompanied the January, 1928, number of the *Journal* containing the documents of the League of Nations Committee of Experts for the Progressive Codification of International Law, the projects prepared by the International Commission of Jurists at Rio de Janeiro in 1927, and the resolutions of the Institute of International Law adopted at Lausanne in 1927. This Special Supplement, he said, was a continuation of the series of previous Special Supplements containing documents in relation to the codification of international law. In this connection, the Honorary Editor-in-Chief called attention to the proceedings, reports, etc., of the Research in International Law undertaken by the Advisory Committee of the Harvard Law School, and suggested the advisability of the issuance of a Special Supplement to the *Journal* containing documents of this Committee. Upon his motion, it was

> *Resolved*, That the Executive Council hereby approves a suggestion to the Carnegie Endowment for International Peace of the advisability of the publication in a Special Supplement to the *American Journal of International Law* of the proceedings, reports, etc., of the Advisory Committee of Research in International Law of the Harvard Law School, as may seem appropriate to the Board of Editors of the *Journal* and to the said Advisory Committee.

The Managing Editor reported that the *American Journal of International Law* had been issued regularly and on time during the preceding year,

and that as a result of the revised contract with the Rumford Press, reported by the Editor-in-Chief, the cost of publication would be reduced by approximately six hundred dollars ($600) per annum. He also reported that he had edited and issued the *Proceedings* of the Annual Meeting for 1927, and that sufficient subscriptions to the *Proceedings* were now received as to practically pay for the cost of printing. He referred to his report as Recording Secretary for information as to the number of subscribers and members now receiving the *Journal*.

Mr. Charles Cheney Hyde, reporting as Chairman of the Committee on Selection of Honorary Members, recommended as the unanimous choice of the Committee, Dr. Dionisio Anzilotti, Judge of the Permanent Court of International Justice at The Hague. The Executive Council thereupon adopted the following resolution:

> *Resolved*, That the Executive Council hereby recommends to the Society the election, as an Honorary Member, of Dr. Dionisio Anzilotti, Judge of the Permanent Court of International Justice at The Hague, and authorizes the Chairman of the Committee on Honorary Members to report this recommendation to the Society at its session on Saturday morning, April 28.

Several members of the Council referred to the noise in the vicinity of the room used for the Society's meeting at the Willard Hotel, and the suggestion was made that the Committee on Annual Meeting try to remedy the situation in the future. The Recording Secretary called attention to the resolution of the Council adopted April 26, 1912, requiring the annual meetings to be held in the same place as the annual banquet. It was the consensus that the Committee on Annual Meeting should be freed from the requirements of this regulation, and the following resolution was accordingly adopted:

> *Resolved*, That hereafter, the Committee on Annual Meeting be, and it is hereby, authorized to select separate places for the annual meeting and the annual banquet of the Society, in the discretion of the Committee.

Mr. Jesse S. Reeves, Chairman of the Special Committee for the Progressive Codification of International Law, reported that a full report of his committee had been presented to the Society at its meeting on the previous day and that this report contained the following recommendations: that the Society express its approval of the present scientific undertaking known as the Harvard Research in International Law into the subjects of nationality, territorial waters, and responsibility of states; that it express its desire to coöperate with the Committee on Research in International Law by affording opportunity and space in the Society's *Journal*, whenever practicable, for the publication of the results reached by the Research Committee; that the Society express its approbation of the attitude of the Government of the United States in making response to the inquiries of the Committee of Ex-

perts of the League of Nations for the Progressive Codification of International Law; and that the Society hopes that there will be a full participation of the Government of the United States in the proposed Hague Conference for the Codification of International Law. After discussion, the Executive Council, upon motion duly made and seconded, approved the recommendations contained in the report of the Special Committee for the Progressive Codification of International Law.

Mr. Ellery C. Stowell, Chairman of the Committee on Annual Meeting, stated that the work of his committee was evident from the program for the present meeting now being successfully carried out.

There was no report from the Special Committee on Publication of Decisions of the Municipal Courts.

Upon motion of Mr. Charles Henry Butler, duly seconded, the Executive Council then authorized an increase in the number of honorary vice presidents to fourteen, and Mr. Nielsen was appointed a committee to communicate this action to the Committee on Nominations.

Upon motion of Mr. James Brown Scott, duly seconded, the Executive Council then adopted the following resolution:

> *Resolved*, That the salary of the Managing Editor of the *Journal* be, and it is hereby, increased to two thousand four hundred dollars ($2,400) per annum, beginning May 1, 1928.

Mr. Scott then gave a brief survey of the growth of the Society and of its work and activities during the twenty-two successful years of its existence, and referred to the possibility of the Society embarking upon a period of still greater usefulness and service. With this purpose in view, he proposed the appointment of a Committee of seven to take into consideration the present situation of the Society and the possibility of arranging future meetings so that the Society will have ample time for the scientific discussion of questions of international law, especially by technical persons who have had practical experience, such discussions to occupy the morning and afternoon sessions of the meeting, reserving the evening sessions for the popular exposition of such subjects. After discussion, the Executive Council adopted the following resolution:

> *Resolved*, That the President be, and he is hereby, authorized to appoint a committee of seven on program and scope of the next annual meeting to consider possible changes in the program of the meeting along the lines suggested by Mr. Scott at the present meeting of the Council, the committee to have power to begin the annual meeting in its discretion on Wednesday instead of Thursday evening, as heretofore.

Upon motion of Mr. Dennis, duly seconded, the following resolution was thereupon adopted:

> *Resolved*, That the American Society of International Law sympathizes with the general purpose and object of the brief resolution concerning the enlargement of the scope of publications of the Depart-

ment of State adopted at the Conference of Teachers of International Law recently held in Washington, and that the President of the Society be requested to appoint a committee to coöperate with the committee appointed by the Teachers' Conference to effectuate the purpose of this resolution, and that all matters of detail be left to the sound judgment of the committee.

There being no further business, the Executive Council adjourned at six o'clock p. m. to meet the following day immediately upon the adjournment of the Society.

GEORGE A. FINCH,
Recording Secretary.

Approved:
CHARLES E. HUGHES
Chairman.

TREASURER'S REPORT

January 1 to December 31, 1927

INVESTMENT ACCOUNT

January 1, 1927. Balance on deposit in Union Trust Company	$85.25	
May 16, 1927. Sale of 3 shares Shell Union Oil preferred at 110	330.00	
June 2, 1927. Purchase of 4 shares Potomac Power Company preferred at 99		$396.00
June 8, 1927. Sale of $6,000 Southern California Edison 5s at 100⅜	6,010.50	
June 8, 1927. Purchase of $6,000 Cuba Northern Railways 5½s at 98½		5,914.58
June 17, 1927. One life membership	100.00	
July 6, 1927. Sale of $2,000 Central Pacific 4% first mortgage at 92½	1,850.00	
July 6, 1927. Purchase of $2,000 International Telephone and Telegraph Corporation 4½s at 92		1,841.25
December 31, 1927. Sale of 4 shares Potomac Power Company preferred at 107⅛ (deposit in Henderson-Winder Company)	426.42	
December 31, 1927. Interest on Union Trust Company deposit	1.43	
	$8,803.60	$8,151.83
Total investment receipts, including balance on deposit in Union Trust Company		$8,803.60
Total investment expenditures		8,151.83
Difference on investments		$651.77
January 1, 1928. Balance on deposit in Union Trust Company		$225.35
January 1, 1928. Balance on deposit with Henderson-Winder Company		426.42
		$651.77

BUSINESS ACCOUNT

RECEIPTS

January 1, 1927. Balance on deposit in Riggs National Bank			$204.02
Membership dues:			
1926	$270.00		
1927	5,294.25		
1928	228.25		
		$5,792.50	
Subscriptions:			
1927	$2,186.25		
1928	2,208.50		
1929	6.25		
		4,401.00	
Foreign postage		383.13	
Proceedings:			
1926	$63.30		
1927	988.95		
1928	152.50		
		1,204.75	
Back Numbers:			
Journals	$829.25		
Proceedings	78.25		
		907.50	
Analytical Index		14.20	

Interest:			
Potomac Power Company preferred	$11.00		
Central Pacific Bonds	94.44		
Shell Union Oil Preferred Stock	9.00		
Southern California Edison 5s	279.17		
Cuba Northern Railway Company 5½s	165.00		
Deposits:			
Union Trust Company	.93		
Riggs National Bank	62.14		
		621.68	
		$13,324.76	
Amounts forward		$13,324.76	$204.02
Banquet		790.00	
Binding		94.50	
Special Supplement		18.90	
Exchange		1.72	
Back dues		20.00	
			14,249.88
Beginning balance ($204.02) and total receipts ($14,249.88)			$14,453.90

DISBURSEMENTS

Salaries:			
Managing Editor	$1,800.00		
Clerks	684.33		
Treasurer's Account	300.00		
Proof reading	160.00		
Preparation of Chronicle	100.00		
		$3,044.33	
Journal:			
Preparation	$54.31		
Printing	6,386.08		
Mailing	385.42		
Back numbers	351.24		
Off-prints	169.91		
Miscellaneous	4.00		
		7,350.96	
Annual Meeting:			
Printing and postage	$71.00		
Telegrams	2.82		
Reporting	179.05		
Banquet	882.45		
		1,135.32	
Proceedings:			
Preparation	$4.86		
Printing	1,034.27		
Mailing	82.87		
		1,122.00	
General Expenses:			
Stationery and postage	$349.91		
Telegrams and cables	6.84		
Freight and express	3.99		
Office supplies	31.39		
Binding	199.00		
Miscellaneous	202.02		
		793.15	
Total disbursements			13,445.76
Balance on deposit in Riggs National Bank, January 1, 1928			$1,008.14

INVESTMENTS

Sold:		
3 shares Shell Union Oil preferred at 110	$330.00	
$6,000 Southern California Edison 5s at 100⅜	6,010.50	
$2,000 Central Pacific 4% first mortgage at 92½	1,850.00	
4 shares Potomac Power Company preferred at 107⅛	426.42	
		$8,616.92
Purchased:		
4 shares Potomac Power Company preferred at 99	$396.00	
$6,000 Cuba Northern Railways 5½s at 98½	5,914.58	
$2,000 International Telephone and Telegraph Corporation 4½s at 92	1,841.25	
		8,151.83
Difference in Investment Account		$465.09
Add: Beginning balance	$85.25	
Life membership	100.00	
Interest Union Trust Company	1.43	
		186.68
		$651.77

ASSETS

Investments:		
$500 Central Pacific 4% first mortgage bonds (cost price)	$481.00	
$6,000 Cuba Northern Railways 5½s at 98½ (cost price)	5,914.58	
$2,000 International Telephone and Telegraph Corporation 4½s at 92 (cost price)	1,841.25	
		$8,236.83
Cash:		
Union Trust Company (Investment Account)	$225.35	
Henderson-Winder Company (Investment Account)	426.42	
Riggs National Bank (Business Account)	1,008.14	
		1,659.91
Accounts receivable:		
Unpaid dues		256.00
		$10,152.74

LIABILITIES

Accounts payable	None	
1928 Membership dues paid in 1927	$228.25	
1928 Subscription fees paid in 1927	2,208.50	
1929 Subscription fees paid in 1927	6.25	
1928 Proceedings paid for in 1927	152.50	
Balance of Treaty Series, League of Nations fund	120.52	
		2,716.02
Excess of Assets over Liabilities		$7,436.72

Respectfully submitted,

LESTER H. WOOLSEY,
Treasurer.

REPORT OF AUDITORS

PRICE, WATERHOUSE & CO.

NATIONAL PRESS BUILDING
WASHINGTON, D. C.

April 24, 1928.

AMERICAN SOCIETY OF INTERNATIONAL LAW,
Washington, D. C.

Dear Sirs:

We have examined the books and records relating to the cash receipts and disbursements of the Society for the year ended December 31, 1927.

All of the recorded cash receipts were traced into the bank statements and found to have been duly deposited. No verification was made of cash receipts other than the interest and dividends received from securities held. All disbursements were supported by properly approved vouchers and either by paid checks returned by the bank or by bank entries in savings account passbook. The cash balances in banks at December 31, 1927 were verified by means of certificates obtained direct from the depositaries. The securities, as listed in Schedule A annexed, held at December 31, 1927 were verified by actual count and inspection and found in order.

We certify that the annexed summary of cash receipts and disbursements is in accordance with the books and, in our opinion, presents fairly a summary of the cash transactions for the year, and the cash position at the close of the year.

Yours very truly,

PRICE, WATERHOUSE & Co.

Summary of Cash Receipts and Disbursements for the Year Ended December 31, 1927

Cash in banks, December 31, 1926:				
Union Trust Company, principal account				$85.25
The Riggs National Bank of Washington, D. C., income account				204.02
				$289.27
Receipts:				
Allocated to principal account:				
Sale of securities		$8,616.92		
Life membership		100.00		
Interest credited by bank		1.43		
			$8,718.35	
Allocated to income account:				
Publications (Schedule A)		$6,546.35		
Membership dues:				
1924	$5.00			
1925	15.00			
1926	270.00			
1927	5,294.25			
1928	228.25			
		5,812.50		
Banquet		790.00		
Foreign postage		383.13		
Binding		94.50		
Interest and dividends on securities		558.61		
Interest on bank balances		63.07		
Exchange		1.72		
			14,249.88	
				22,968.23
				$23,257.50
Disbursements:				
From principal account,				
Purchase of securities			$8,151.83	
From income account,				
Publications:				
Journal	$7,350.96			
Proceedings	1,122.00			
		$8,472.96		
Salaries		3,044.33		
Annual meeting		1,135.32		
General expenses		793.15		
			13,445.76	
				21,597.59
				$1,659.91
Cash in banks, December 31, 1927, as under:				
Union Trust Company, principal account		$225.35		
Henderson-Winder Company, principal account		426.42		
			$651.77	
The Riggs National Bank of Washington, D. C., income account			1,008.14	
				$1,659.91

Schedule A

Analysis of Receipts from Sales of Publications for the Year Ended December 31, 1927

Journal subscriptions:			
1927		$2,186.25	
1928		2,208.50	
1929		6.25	
			$4,401.00

Proceedings subscriptions:		
1926	$63.30	
1927	988.95	
1928	152.50	
		$1,204.75
Back numbers:		
Journals	$829.25	
Proceedings	78.25	
		907.50
Special supplements		18.90
Analytical index		14.20
		$6,546.35

SECURITIES HELD AT DECEMBER 31, 1927

The following bonds of the Society held by the Treasurer were examined March 31, 1928:

		Par Value
Central Pacific Railroad Co., First Mortgage 4%, due 1949:		
Bond number, 2645		$500.00
Cuba Northern Railways Co., 5%, due 1942:		
Bond number, 17760	$1,000.00	
" " 17761	1,000.00	
" " 17762	1,000.00	
" " 17763	1,000.00	
" " 17764	1,000.00	
" " 17765	1,000.00	
		6,000.00
International Telephone and Telegraph Corp'n 4½%, due 1952:		
Bond number T 4801	$1,000.00	
" " T 4802	1,000.00	
		2,000.00
		$8,500.00

MINUTES OF THE EXECUTIVE COUNCIL

Saturday, April 28, 1928

Pursuant to adjournment, the Executive Council of the American Society of International Law met in the Willard Room of the Willard Hotel, Washington, D. C., immediately upon the adjournment of the Society on Saturday, April 28, 1928, at 12.30 o'clock p. m.

The President of the Society, the Honorable Charles Evans Hughes, presided.

Present:

Chandler P. Anderson
Philip M. Brown
Charles Henry Butler
William C. Dennis
Edwin D. Dickinson
Jacob M. Dickinson
George A. Finch
Richard W. Flournoy
James W. Garner
Charles E. Hill
Charles E. Hughes
W. O. Hart
Manley O. Hudson
William I. Hull
H. T. Kingsbury
Arthur K. Kuhn
Frederic D. McKenney
Charles E. Martin
Frederick A. Middlebush
Edwin B. Parker
James Brown Scott
Ellery C. Stowell
Thomas R. White
George Grafton Wilson
Jesse S. Reeves

The Council proceeded to the election of officers and committees for the ensuing year, and the following were duly elected:

Chairman of the Executive Council: Edwin B. Parker.
Recording Secretary: George A. Finch.
Corresponding Secretary: William C. Dennis.
Treasurer: Lester H. Woolsey.

Executive Committee:

Chandler P. Anderson
Charles Henry Butler
Richard W. Flournoy
Charles Noble Gregory
David Jayne Hill
Robert Lansing
Frederic D. McKenney
Jesse S. Reeves
George Grafton Wilson

Editorial Board of the American Journal of International Law:

Honorary Editor-in-Chief, James Brown Scott
Editor-in-Chief, George Grafton Wilson
Managing Editor, George A. Finch

Chandler P. Anderson	David Jayne Hill
Edwin M. Borchard	Manley O. Hudson
Philip Marshall Brown	Charles Cheney Hyde
William C. Dennis	Arthur K. Kuhn
Edwin D. Dickinson	Jesse S. Reeves
Charles G. Fenwick	Ellery C. Stowell
James W. Garner	Lester H. Woolsey

Quincy Wright

Committee on Selection of Honorary Members: Arthur K. Kuhn, Chairman; Edwin M. Borchard; James W. Garner.

Special Committee on Collaboration with League of Nations Committee for the Progressive Codification of International Law: Jesse S. Reeves, Chairman; Edwin M. Borchard; Philip Marshall Brown; C. K. Burdick; Edwin D. Dickinson; Charles G. Fenwick; James W. Garner; Manley O. Hudson; Philip C. Jessup; Arthur K. Kuhn; Pitman B. Potter; James Brown Scott; Ellery C. Stowell; George Grafton Wilson; Quincy Wright.

Upon motion duly made and seconded, the appointment of the Committee on Increase of Membership was referred to the President with power.

The President announced the appointment of the following Committee on Program and Scope of the Annual Meeting under resolution adopted by the Executive Council at its meeting on April 27: James Brown Scott, Chairman; Charles K. Burdick; Edwin D. Dickinson; Manley O. Hudson; Arthur K. Kuhn; Thomas Raeburn White; Quincy Wright. The committee on the next annual meeting having thus been provided for, no further action was considered necessary by the Council.

In connection with the reëlection of the Editorial Board of the *American Journal of International Law*, it was moved by Mr. Hudson, duly seconded and carried, that it is the sense of the Executive Council that the Editor-in-Chief of the *Journal* should present to the meeting of the Council charged with the election of the members of the Editorial Board a detailed report on the activities of the Board during the preceding year.

Mr. Brown then referred to the death of Mr. Archibald Cary Coolidge since the last meeting of the Society. He said that, while Mr. Coolidge was not a member of the Executive Council, he was a distinguished figure in the international field, and represented that class of workers who are very little known by the people at large but who enjoy the highest esteem in the opinion of those qualified to judge men and services. Mr. Coolidge contributed in a very remarkable way, Mr. Brown continued, to the development of expert opinion in the United States. Other members of the Council spoke in high praise of Mr. Coolidge's service and counsel in international affairs, and Mr. George Grafton Wilson referred to the aid received from him in obtaining material for publication in the *American Journal of International Law*. Upon motion of Mr. Brown, duly seconded, it was voted that there be en-

tered in the minutes of the Executive Council an expression of the deep loss to the cause of international law and international relations sustained by the Society in the death of Mr. Coolidge.

Mr. Dennis then called attention to the death of Mr. Edward C. Eliot, a member of the Executive Council and an earnest friend and active member of the Society. Upon his motion, duly made and seconded, an appropriate entry was ordered made in the minutes of the Council expressing its sense of loss at the passing of Mr. Eliot.

Whereupon, the Council, at one o'clock p. m. adjourned *sine die*.

GEORGE A. FINCH,
Recording Secretary.

Approved:
CHARLES E. HUGHES,
Chairman.

LIST OF MEMBERS

of the

AMERICAN SOCIETY OF INTERNATIONAL LAW

HONORARY MEMBERS

Anzilotti, Dionisio, Judge of the Permanent Court of International Justice, The Hague, Holland.
Fromageot, Henri, 1, rue de Villersexel, Paris, France.
Huber, Max, Ossingen, Canton of Zurich, Switzerland.
Lyon-Caen, Charles, 13, rue Soufflot, Paris, France.
Rolin, Alberic, Avenue Moliere 236, Brussels, Belgium.

LIFE MEMBERS

Anderson, Luis, San Jose, Costa Rica.
Balch, Thomas W., 4300 St. Paul Street, Baltimore, Md.
Calonder, Felix, President de la Commission Mixte de Haute Silesie, Katowice, Poland.
Carvajal, Henriquez, Santiago, Cuba.
Chang, Ziang-ling, 3320 Point Road, Shanghai, China.
Coudert, Frederic R., Jr., 2 Rector Street, New York City.
Esty, Robert Pegram, 328 Chestnut Street, Philadelphia, Pa.
Hawes, Gilbert Ray, 2 Rector Street, New York City.
Hyde, James H., 67 Boulevard Lannes, Paris, XVI, France.
Jackson, John B., U. S. Despatch Agency, 4 Trafalgar Square, London, England.
Koo, V. K. Wellington, c/o Minister of Foreign Affairs, Peking, China.
Kodera, Kenkichi, 3 Nakayamatedori-Gochome, Kobe, Japan.
Marshall, Louis, 30 Broad Street, New York City.
Pardo, Felipe, c/o Peruvian Legation, Washington, D. C.
Peaslee, Amos J., 501 Fifth Avenue, New York City.
Portela, Epifanio, Argentine Legation, Rome, Italy.
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